

REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT – FOURTH SESSION

PUBLIC INVESTMENTS COMMITTEE

**REPORT ON CONSIDERATION OF THE SPECIAL AUDIT REPORT ON
PROCUREMENT OF PRE-EXPORT VERIFICATION OF CONFORMITY
(PVOC) TO STANDARD SERVICES FOR USED MOTOR VEHICLES, MOBILE
EQUIPMENT AND USED SPARE PARTS BY KENYA BUREAU OF
STANDARDS**

AS ADOPTED BY THE HOUSE ON 13TH OCTOBER 2020

**DIRECTORATE OF COMMITTEE SERVICES
THE NATIONAL ASSEMBLY
PARLIAMENT BUILDINGS
NAIROBI**

JUNE 2020

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ABBREVIATIONS AND ACRONYMS

ATJ	-	Auto Terminal Japan
JFA	-	Japan Forwarding Agency
KEBS	-	Kenya Bureau of Standards
PPARB	-	Public Procurement Administrative Review Board
PPRA	-	Public Procurement Regulatory Authority
PVOC	-	Pre-Export Verification of Conformity
QSIJ	-	Quality Inspection Services Incorporated Japan
WTO	-	World Trade Organization
TBT	-	Technical Barriers to Trade
UAE	-	United Arab Emirates
UK	-	United Kingdom
AG	-	Attorney General
OAG	-	Office of the Auditor General
ODM	-	Orange Democratic Movement
JP	-	Jubilee Party
FORD	-	Forum for Restoration of Democracy
WDM	-	Wiper Democratic Movement

CHAIRMAN'S FORWARD

Pursuant to the provisions of Article 252 (1) and Article 229 (6) of the Constitution of Kenya and Section 38 of the Public Audit Act, the Office of the Auditor-General conducted a special audit at Kenya Bureau of Standards (KEBS) with a focus on the procurement of Pre-Export Verification of Conformity (PVOC) to Standards Services for used Motor Vehicles, Mobile Equipment and Used Spare Parts by KEBS under Tender Number: KEBS/T019/2017-2020. The Special Audit Report was tabled in the National Assembly and referred to the Public Investments Committee on 21st November, 2019.

This Special Audit Report served as a follow-up on the previous tender and special audit report dated 16th January 2016, tabled by the Public Investments Committee and adopted by the House on 30th November 2016. The Office of the Auditor-General sought to identify factors that triggered the need for the procurement of Pre-Verification of Conformity (PVOC) Services and review the procurement process for the service by the Kenya Bureau of Standards.

In its consideration of the Report, the Committee sought to ascertain the findings by the Office of the Auditor-General on the current and past bidders for the Pre-Export Verification of Conformity (PVOC) to Standards Services for used Motor Vehicles, Mobile Equipment and Used Spare Parts by KEBS.

The Committee received representations from the following entities in its consideration of the Special Audit Report:

- (1) Kenya Bureau of Standards
- (2) The Public Procurement Regulatory Authority;
- (3) M/S EAA Company Limited;
- (4) M/S Auto Terminal Japan;
- (5) The Attorney General (AG)
- (6) Quality Inspection Services Inc. Japan (QISJ) and,
- (7) The Office of the Auditor General (OAG).

The Committee further sought to establish if KEBS has implemented the recommendations of the National Assembly on the Special Report on the Inquiry into the Allegations of Procurement Irregularities in the Award of the Kenya Bureau of Standards Tender NO. KEBS/T057/2014-2015

for the Provision of Pre-Export Inspection Services for Used Motor Vehicles adopted by the House on 30th November, 2016.

This report contains the submissions by the aforementioned entities which appeared before the Committee, observations, findings and recommendations arising from the Committee's consideration of the Special Audit Report by the Office of the Auditor General.

At the conclusion of its sittings, the Committee was able to verify most of the Auditor General's observations in his Special Audit report. Such observations included misrepresentations by M/S EAA and M/S ATJ on ownership of inspection facilities abroad contrary to the reality on the ground; conflict of interest and forgery / falsification of documents. It further emerged that the KEBS had initiated a new tender No. **KEBS/T010-2019-2021** and awarded it both to M/S EAA & M/S ATJ. The effect of the new tender was similar in scope as Tender No. KEBS/T019/2017-2020 that was ongoing between KEBS and M/S QSIJ. Despite the Committee's advice to KEBS to consult the AG on the matter, KEBS procrastinated and eventually awarded the contract against the belated advice of the AG. The effect of that award potentially exposes KEBS to litigations due to contractual breach. Tender No. KEBS/T019/2017-2020 was running to 15th April 2021. The DCI, EACC and the PPRA had seized of the matter with the PPRA returning its interim findings against continuation of the tendering process.

The Committee further found out that the debarment regulations contemplated under Section 41 of the Public Procurement and Disposal Act, 2015 had not been gazetted and therefore there was no legal framework to use in debarment proceedings. This explains why nothing had happened to M/S EAA who had been recommended for debarment in as earlier as 2016.

Having proved the audit observation in the Special Audit and also looked at the tendering process in tender No. KEBS/T019/2017-2020, the Committee is in concurrence with the Auditor General that debarment proceedings should be instituted against M/S EAA and M/S ATJ for flouting procurement law; the KEBS Managing Director, Mr. Bernard Njiraini to be held personally responsible for any losses that may arise out of litigation from awarding tender No. **KEBS/T010-2019-2021** against the advice of the AG; and the Cabinet Secretary for the National Treasury & Planning to expedite processing of the debarment regulations contemplated in Section 41(1)(h) of the PPAD Act, 2015 .


This Committee report speaks to two things: the first limb of the report focusses on the findings of the Audit General's report in his special audit of the KEBS's procurement of the Pre-Export Verification of Conformity (PVOC) to Standards Services for used Motor Vehicles, Mobile Equipment and Used Spare Parts by KEBS under Tender No:KEBS/T019/2017-2020 while the second limb is about the KEBS's procurement of process of tender No. KEBS/T019-2021 that KEBS that was allegedly awarded in April 2020. I will speak to the two one after the other.

It Is Important to Indicate from the outset that the Committee did not go into the merits of tender No. KEBS/T019-2021 since It was a work in progress by KEBS as at that time. The Committee only looked at the procurement process of the said tender as into was umbilically connected to the first tender - with the same bidders and scope of work.

The Committee appreciates the Offices of the Speaker and the Clerk of the National Assembly for the support accorded to it to enable it to operationalise its mandate. The Committee further extends its appreciation to the Office of the Auditor- General and all the witnesses that appeared and made representations when the Committee was considering the Special Audit Report.

May I also extend my appreciation to my fellow Members of the Committee whose immense contributions and dedication to duty has enabled the Committee to examine the audit queries and produce this report.

On behalf of the Public Investments Committee and pursuant to Standing Order 44, it is my pleasant duty to present this Report on the consideration of the Special Audit Report on Procurement of Pre-Export Verification of Conformity (PVOC) to Standard Services for Used Motor Vehicles, Mobile Equipment and Used Spare Parts by Kenya Bureau of Standards.


HON. ABDULLSWAMAD SHARIFF NASSIR, MP
CHAIRPERSON, PUBLIC INVESTMENTS COMMITTEE

1.0 PREFACE

1.1 Committee Mandate

The Public Investments Committee is established under Standing Order 206 and mandated to examine reports of the Auditor-General laid before the National Assembly to ensure probity, efficiency and effectiveness in the use of public funds. The Committee is also mandated to examine in the context of the autonomy and efficiency of the public investments, whether the affairs of the public investments, are being managed in accordance with sound financial or business principles and prudent commercial practices.

The Committee is guided by the following pieces of legislations and codes in carrying out its mandate:

- (a) the Constitution of Kenya;
- (b) the National Assembly (Powers and Privileges) Act (Cap. 6);
- (c) the State Corporations Act (Cap. 446);
- (d) the Public Procurement and Disposal Act, 2005;
- (e) the Public Procurement and Disposal Regulations, 2006;
- (f) the Public Procurement and Assets Disposal Act, 2015
- (g) the Public Finance Management Act, 2012;
- (h) the Public Audit Act, 2015 among others.
- (i) the National Assembly Standing Orders 2013;

1.2 Committee Membership

The Public Investments Committee constituted by the House on December 2017 comprises of the following Members:

Name of Member	Constituency	Party
Hon. Abdullswamad Sharrif Nassir, MP Chairperson	Mvita	ODM

Hon. Ahmed Abdisalan Ibrahim, MP Vice-Chairperson	Wajir North	ODM
Hon. (Dr.) Chrisantus Wamalwa Wakhungu C.B.S, MP	Kimini	Ford Kenya
Hon. Raphael Bitta Sauti Wanjala, MP	Budalangi	ODM
Hon. Justus Kizito Mugali, MP	Shinyalu	ODM
Hon. Gladys Nyasuna Wanga, C.BS. MP	Homa-Bay County	ODM
Hon. John Muchiri Nyaga, MP	Manyatta	JP
Hon. (Prof.) Mohamud Sheikh Mohammed, MP	Wajir South	JP
Hon. Babu Owino Paul Ongili, MP	Embakasi East	ODM
Hon. James Githua Kamau Wamacukuru, MP	Kabete	JP
Hon. Joash Nyamache Nyamoko, HSC, MP	North Mugirango	JP
Hon. Mary Wamaua Waithira Njoroge, MP	Maragwa	JP
Hon. Mohamed Hire Garane, MP	Lagdera	KANU
Hon. Omar Mohamed Maalim Hassan, MP	Mandera East	EFP
Hon. Paul Kahindi Katana, MP	Kaloleni	ODM
Hon. Purity Wangui Ngirici, MP	Kirinyaga County	JP
Hon. Rashid Kassim Amin, MP	Wajir East	WDM-K
Hon. Zachary Thuku Kwenya, MP	Kinangop	JP

1.3 Committee Scretariat

Mr. Evans Oanda	-	Senior Clerk Assistant
Ms. Marlene Ayiro	-	Senior Legal Counsel
Mr. Mohamed Boru	-	Clerk Assistant II
Mr. Alex Mutuku	-	Senior Sergeant-at-Arms
Mr. Thomas Ogwel	-	Fiscal Analyst III
Mr. Eric Kariuki	-	Research Officer II

Mr. Noelle Chelagat - Media Relations Officer III

Mr. John Mungai - Audio Recording Officer

Committee Proceedings

In its consideration of the Special Audit Report, the Committee held eleven (11) sittings in which it adduced evidence from the following entities:

- (a) Kenya Bureau of Standards;
- (b) The Public Procurement Regulatory Authority;
- (c) M/S EAA Company Limited;
- (d) M/S Auto Terminal Inc. Japan;
- (e) Office of the Auditor General;
- (f) Quality Inspection Services Japan
- (g) Attorney General

CHAPTER TWO

2.1 Introduction

1. The Kenya Bureau of Standards (KEBS) is a statutory body that was established by the Standards Act of 1973, Cap 496. The Standards Act, Part 11 – Section 3(c) empowers the Bureau to enter into contracts and doing or performing all such other things or acts for the proper performance of its functions.
2. KEBS developed a code of practice for inspection of road vehicles that specifies general, safety and environmental requirements. The code came into being to address challenges arising from importation of defective motor vehicles in the Kenyan market.

2.2 General Overview of the Provision of Pre-Export Inspection Services (PVOC)

3. PVOC Program is a conformity assessment program applied to products at the respective exporting countries, to ensure their compliance with the applicable Kenyan Technical Regulations and Mandatory Standards or approved specifications.

Legal Basis of the Pre-Export Verification of Conformity Programme

4. PVOC programme was started on 29th September 2005 by KEBS, through the publication of Legal Notice No. 78 of 15th July, 2005 by the Minister for Trade and Industry. The program is also fully compliant with the provisions of *Article 5* of World Trade Organization (WTO) Technical Barriers to Trade (TBT) Agreement.

Objectives of the Pre-Export Verification of Conformity Programme

5. The following are the objectives of the Pre-Export Verification of Conformity programme:
 - (a) To ensure quality of products, health and safety, and environmental protection for consumers.
 - (b) To facilitate trade by ensuring that compliant goods are given expedited clearance at the port of entry.

- (c) To safeguard the country from unfair trade practices and dumping of substandard goods by ensuring that imported products comply with the same requirements to which locally manufactured goods are subjected.
- (d) To safeguard the country's national security.
- (e) To prevent deceptive trade practices.

Operations of the Pre-Export Verification of Conformity Program

- 6. The program is operated by accredited third party inspections companies on behalf of KEBS. The world is divided into nineteen (19) regions based on proximity and trade volumes. In addition, the program provides for multiple partners in majority of the regions to enhance efficiency. The basis of certification is Kenya's standards or approved specifications.
- 7. Unlike other goods, moto vehicles inspection services has not been divided into regions

Special Audit Report of the Auditor General on Kenya Bureau of Standards Tender No.KEBS/T057/2014-2015 for Provision of Pre-Export Inspection Services for Used Motor Vehicles

- 8. After following the set out legal process, in its meeting held in December 2014, the KEBS Tender Committee approved the award of the Tender No. KEBS/T057/2014-2015 of Motor Vehicle inspection/verification services to Quality Inspection Service Inc. Japan and directed that due diligence be carried out before signing the contract.
- 9. A special audit on the tender No KEBS/T057/2014-2015 for the provision of pre-export inspection services for motor vehicles in Japan, United Arab Emirates, United Kingdom and South Africa was carried out following a request by the Clerk of the National Assembly in June 2015.
- 10. The findings of the report were that the procuring entity (KEBS) observed the provisions of the PPAD Act, 2005 and the attendant regulations and due process was adhered to in awarding the tender.
- 11. The PIC report recommendations of 30th November 2016 that could be germane in the current report was to the effect that:

“in order to ensure that a contracted company has a long-term commitment to inspection and keep off speculative bidders, KEBS should set minimum requirements for full

ownership of inspection facilities by the inspection companies based on the proportion of the number of vehicles coming from each country. It is recommended that the inspection company should fully own at least fifteen (15) facilities in Japan, three (3) in the United Kingdom and one (1) in the United Arab Emirates, distributed in major ports and towns. Leases in these towns can only be allowed to supplement fully owned facilities. KEBS should properly evaluate ownership of these facilities."

2.3 Special Audit Report

12. The Auditor-General conducted a follow-up special audit at Kenya Bureau of Standards (KEBS) after the May 2016 Special Audit Report had been finalized with a specific focus on the procurement of pre-export verification of conformity (PVOC) to standards services, For used Motor Vehicles, Mobile Equipment and used Spare Parts. The Auditor-General opted to conduct a second phase of the special audit being guided by the following terms of reference:
 - (a) Identify factor (s) that triggered the need for the procurement of the Pre-Verification of Conformity (PVOC) Services- For used Motor Vehicles, Mobile Equipment and Used Spare Parts;
 - (b) Review the procurement process in line with the provisions of the PPAD, Act 2015 and the attendant Regulations of 2006;
 - (c) Identification of any suspicious, forged or misrepresentation on the documents used in the tendering and procurement process by any of the bidding companies;
 - (d) Review the appeals filed by bidding companies at the Procurement Administration Review Board, Court or tribunals and review the justifications and eventual ruling;
 - (e) Review due diligence and internal audit reports by KEBS to assess the level of performance of current and past bidders;
 - (f) Ascertain the terms of the contract and the actual existence of the services as specified in the contracts;

- (g) Establish current performances of the service provider and total amounts paid in relation to service provided; and
 - (h) Identify and report on any irregularities and culpabilities on the above processes
13. The special audit reviewed the entire procurement process, procedures followed and documentation by the procuring entity and bidders of the Tender for Pre-Export Verification.

Findings of the Second Special Audit Report

14. The Office of the Auditor-General made the following findings in the Second Special Audit Report:
- (a) KEBS followed the proper law in effecting the tender process for the PVOC and awarded Ms Quality Inspection Services Inc. Japan (QISJ) who were the highest bidder with a combined score of 94 marks out of 100. The Company had demonstrated its capacity to deliver on the requirements of the current contract.
 - (b) M/S. EAA Company limited and M/s Auto Terminal Japan (ATJ) Ltd did not win the tender. It was established through the Special Audit that the two companies provided fraudulent and misleading information contrary to the provisions of section 41(1) (h) of the PPAD, 2015.
 - (c) The Auditor General recommended debarment of M/S EAA and M/S ATJ for violating the procurement law.

CHAPTER: EVIDENCE

3.1 EVIDENCE SUBMITTED BY THE KENYA BUREAU OF STANDARDS

15. **Lt. Col. (Rtd.) Bernard Njiraini, the Managing Director of Kenya Bureau of Standards accompanied by Ms. Esther Ngari (Director, Standards); Mr. Ahmed Amin (Head of Department, Inspection); Ms. Josephine Mwakithi (Acting Head of Department, Procurement); Mr. Mmbwanga Brian (Legal Counsel); Dr. James Muriuki (Personal Assistant to the Managing Director); and, Ms. Janet Kamau (Corporate Communication Officer) appeared before the Committee to adduce evidence on the Special Audit Report on Procurement of Pre-Export Verification of Conformity to Standards for Motor Vehicles and Spare Parts.**

16. The Committee was briefed as follows:

Background on Pre-Export Verification of Conformity

17. Pre-Export Verification of Conformity (PVOC) to standards was said to be a conformity assessment program applied to products at the respective exporting countries, to ensure their compliance with the applicable Kenyan Technical Regulations and Mandatory Standards or approved specifications.
18. PVOC program was started on 29th September 2005 by KEBS, through the publication of *Legal Notice No. 78 of 15th July, 2005* by then Minister for Trade and Industry. This Legal Notice was revoked by *Legal Notice No. 127 of 19th June 2018*. On 5th December, 2019, the Cabinet secretary, Ministry of Trade, Industry and Co-operatives revoked this Legal Notice and issued Legal Notice 183. The program is also fully compliant with the provisions of Article 5 of WTO TBT Agreement.

Background on Pre-Export Verification of Conformity

19. Kenya Bureau of Standards established the PVOC program with the following objectives:
- a) To ensure quality of products, health and safety, and environmental protection for consumers.

- b) To facilitate trade by ensuring that compliant goods are expeditiously cleared at the port of entry.
- c) To safeguard the country from unfair trade practices and dumping of substandard goods by ensuring that imported products comply with the same requirements to which locally manufactured goods are subjected.
- d) To safeguard the country's national security.
- e) To prevent deceptive trade practices.
- f) To enhance efficiency of clearance of imported goods at the ports of entry

Operations of the Program

- 20. The PVOC program is operated by accredited third party inspection companies on behalf of KEBS. The basis of certification is Kenya standards or approved specifications by KEBS.

Motor vehicle inspection

- 21. KEBS contracted Quality Inspection Services Inc. Japan (QISJ) to offer Pre-Export Verification of Conformity to Standards services in Japan, United Arab Emirates, United Kingdom, Thailand and South Africa for;
 - a) Used Vehicles, in accordance with **KS 1515:2000 - Code of Practice for Inspection of Road Vehicles** and for the inspection of used vehicles for radioactive contamination and verification of odometer integrity.
 - b) Mobile equipment in accordance with relevant Kenya Standards or approved specification.
 - c) Used spare parts for vehicles, Mobile equipment and Industrial / Agricultural Machinery in accordance with relevant Kenya Standards or approved specification.
- 22. Some of the key parameters that KEBS has set for a vehicle entering Kenya to pass inspection include but not limited to:
 - a) The vehicle shall not exceed 8 years from the date of first registration in the country of origin;
 - b) Must be right-hand drive;
 - c) Vehicles must not exhibit any forms of structural defects on the Chassis and critical linkages;

- d) Specialized vehicles like mining trucks, excavators, combines harvesters, tractors, fire trucks are exempt from this once roadworthiness is verified;
- e) Vehicles must not emit visible smoke to prevent environmental pollution; and
- f) Vehicles imported from Japan must be inspected for radiation contamination

Number of Vehicles Inspected Under the PVOC Program

23. The table below indicates the summary of the units inspected under the program from the year 2015:

Year	TOTALS PER YEAR
2015	84072
2016	65535
2017	80545
2018	87739
2019	91179
Total	409070

Table 1: Number of Vehicles Inspected

No	Country	Region	Inspection Companies
1.	Bahamas	Caribbean	Eaa
2.	Bangladesh	South Asia	Jaai, Bv
3.	Chile	South America	No Inspection
4.	D.R. Congo	Africa	Dgda, Occ, Ministry Of Commerce
5.	Fiji	Oceania	Jevic
6.	Georgia	Europe	No Inspection
7.	Jamaica	Caribbean	Atj, Jaai, Jevic
8.	Kenya	Africa	Qisj
9.	Malta	Europe	Vca, Jevic
10.	Mauritius	Indian Ocean	Eas. Jevic, Jaai
11.	Mongolia	Asia	No Inspection
12.	Mozambique	Africa	Intertek
13.	Myanmar	South East Asia	No Inspection
14.	New Zealand	Oceania	Jevic, Atj, Moana
15.	Papua New Guinea	Oceania	Jevic
16.	Philippines	South East Asia	Intertek
17.	Russia	Europe	No Inspection
18.	Singapore	Southern Asia	Eaa, Jevic
19.	South Africa	Africa	No Inspection
20.	Sri Lanka	South Asia	Jevic, Jaai, Bv
21.	Tanzania	Africa	Eaa. Qisj. Atj. Intertek
22.	U.A.E.	Middle East	No Inspection
23.	Uganda	Africa	Eaa. Jabal Kilimanjaro, Auto Elect. Mech

24.	Zambia	Africa	Eaa, Jevic, Atj
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Table 2: Motor vehicle Inspection Service providers in the World

Timelines for Vehicle Inspection by QISJ

- a) KEBS monitoring records indicate that on average, it takes four (4) days to inspect a motor vehicle from the date of the request for inspection is submitted by client.
- b) On average, it further takes two (2) days to issue a certificate of road worthiness (COR) from date of inspection.

3.2 KENYA BUREAU OF STANDARDS TENDER NO. KEBS/T019/2017-2020

- 24. Following the lapse of the previous three-year inspection cycle, KEBS procured for inspection services for the period 2017-2020.

The Tendering Process

- 25. The Kenya Bureau of Standards (KEBS) advertised the tender no. KEBS/T019/2017-2020 in two dailies; the *Nation* and the *Standard* newspapers, on 21st November, 2017. The tender was also advertised in the KEBS website for a period of twenty-one days. The tender was opened on 6th December, 2017 by the tender processing committee in the presence of bidders.
- 26. Fours bids were received from the following companies:
 - a) M/S Nippon Inspection Centre Corporation;
 - b) M/S Auto terminal Japan Ltd;
 - c) M/S Quality Inspection Services Inc. Japan; and
 - d) M/S EAA Company Limited.

Evaluation of Bids

- 27. Evaluation of the bids was carried out in line with the provisions of Section (80) of Public Procurement and Asset Disposal (PPAD) Act 2015. M/S Nippon Inspection Centre Corporation and M/S EAA Company Limited were disqualified at preliminary stage for not substantially responding to the requirement of clause 2.2.11 (a) on 15 of 49 of the tender document. The two companies did not qualify to proceed to the Technical evaluation stage as per evaluation report.

28. Bidders M/S Auto terminal Japan Ltd and M/S Quality Inspection Services Inc. Japan were responsive to all the requirements of clause 2.2.11 (a) hence proceeded to the technical evaluation stage.
29. According to the evaluation report, M/S Auto terminal Japan Ltd scored 40% out of 80% and failed to meet the minimum technical score of 70% to proceed to financial evaluation. M/S quality Inspection services Japan (QISJ) attained a score of 74% out of 80% and met minimum technical score of 70% to proceed to financial evaluation.
30. The financial opening and evaluation was carried to M/s Quality Inspection Services Inc. Japan (QISJ).

Due Diligence

31. Due diligence was conducted in conformity with the provisions of Section 83(1) Public Procurement and Asset Disposal (PPAD) Act 2015 to the M/s Quality Inspection services Japan (QISJ) who were recommended for the award.
32. Having met the requirements of the tender documents the contract was awarded to M/s Quality Inspection services Japan (QISJ) on 10th January, 2018 for a period of 36 months.

The Auditor General carried out a special audit to three firms out of the four (qualified and disqualified) firms which submitted their bid documents i.e. M/s Auto terminal Japan Ltd, M/s Quality inspection services Inc. Japan and M/s EAA company Limited.

Appeal for Re-Evaluation of the Technical Proposal

33. On 17th January, 2018, the Public Procurement Administrative Review Board (PPARB) wrote a letter ref: PPRA/ARB/7/14/2018 to the KEBS notifying it of a Request for Review by M/s Auto Terminal Japan Ltd seeking re-evaluation of the technical proposal.
34. On 6th February, 2018 PPARB heard and determined the Request for Review. The Request for Review by Auto Terminal Japan Ltd was dismissed by PPARB and KEBS was advised to proceed with the procurement to its logical conclusion.

Award of Contract

35. KEBS and Quality Inspection Services Inc. Japan (QISJ) entered into contract agreement on 3rd April 2018 for a period of 3 years effective 15th April 2018.

Kenya Bureau of Standards Tender NO. KEBS/T010/2019-2021 - Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) Services

36. The tender was advertised on 3rd December 2019 on MyGov in the Daily nation newspaper and KEBS website. The tender sought to expand the contract for provision of PVOC services by bringing in additional service providers for the contract duration.
37. The tender opening and the tender evaluation committees were appointed on 6th January, 2020 and 7th January 2020 respectively, by the accounting officer/ Managing Director as per Section 46(1) of the Public Procurement and Asset Disposal Act 2015 to evaluate the international tender number KEBS/T010/2019-2021 and conduct due diligence prior to award of the tender.
38. Tender evaluation was carried out as per Section 80 of Public Procurement and Asset Disposal Act 2015. The tender evaluation committee began evaluation on 9th January 2020. The evaluation of the bids was carried out in three (3) stages as per the requirement 2.11.2 in the appendix to instructions to the tenderers;

Preliminary Evaluation

39. M/S Nippon was disqualified at the preliminary evaluation stage for failing to minute the requirement prescribed in the tender document, page 19 of 55. The tender evaluation committee recommended that their bid be declared unresponsive. M/S EAA Company Limited and M/S Auto Terminal Japan Limited qualified to proceed for technical evaluation.

Technical Evaluation

40. The tender evaluation committee scored individually the bids as per the criteria in the tender documents. Based on the technical evaluation results, M/S EAA Company Limited and M/S Auto Terminal Japan Limited attained scores above the minimum score. Therefore, the committee recommended the two companies to proceed to financial evaluation stage.

Financial Evaluation

41. The financials for the two companies which qualified at technical evaluation; M/S EAA Company Limited and M/S Auto Terminal Japan Limited were opened on 15th January, 2020 in the presence of the bidders whose technical proposal was successful. The two bidders met requirements of the financial criteria prescribed in the tender documents.

Tender Evaluation Committee Recommendation

42. The tender evaluation committee recommended the award of the international tender KEBS/T010-2019-2021 for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to standards services for used motor vehicles, mobile equipment and spare parts to EAA Company Limited and Auto Terminal Japan Limited. The two companies had scored the required overall score of 90.7 and 90.9 marks respectively, out of a maximum 100 points. The award was subject to conduct of due diligence and consideration of the report confirming and verifying the qualifications of the bidders.

3.3 EVIDENCE BY EAA COMPANY LIMITED

43. **Mr. Prosper Sugai, the Chief Executive Officer of EAA Company Limited, accompanied by Mr. Andrew Ombwayo (Advocate) appeared before the Committee to adduce evidence on the Special Audit Report on the Pre-Verification of Conformity to Standards for Motor Vehicles and Used Spare Parts by Kenya Bureau of Standards.**
44. The respondent raised preliminary objections to the Committee's consideration on the following grounds:

- a) Constitutional Grounds – The respondent stated that hat the National Assembly, and specifically the Public Investment Committee (PIC), was time-barred under Article 229(8) Constitution of Kenya 2010 from holding this hearing to consider the afore mentioned Auditor-General's Report.

He cited Article 229(8) of the Constitution of Kenya which obligates the National Assembly to debate and consider the Auditor-General's report, and take appropriate action upon it, all within three (3) months of receiving the report. Since the Special Audit Report before the PIC was presented to the House on 13th November, 2019, the House had until the 11th February, 2020 to debate and consider it, and to take

appropriate action upon it in default of which the House, and the PIC, could not hold the said hearing.

- b) Want of Publication and Publicization of the Special Audit Report –Neither Parliament nor the Auditor General published or publicized the Special Audit Report under review as required by Section 32 Public Audit Act No. 34 of 2015. As a result, the intention of Parliament, which was to allow public scrutiny and involvement, or even awareness of, the audit process, had been skipped and otherwise obviated, on account of which the said hearing, to consider the subject report, was rendered both invalid, null and void ab initio, and any recommendation that may or arising from it should equally be rendered a nullity.
- c) Auditor-General Acted Ultra Vires His Constitutional and Statutory Mandate - Auditor-General exceeded both his Constitutional and Statutory mandate in the manner it carried out its examination, inspection and audit, which birthed the special audit report under review. The Constitutional mandate of the Auditor-General under Article 229 Constitution 2010 limits the Auditor-General to conducting audits of the Government and public institutions, and of public funds and its use, and does not extend to private companies who lost in their bid and have no linkage to public funds.
- d) Breach of Respondent's Right to Natural Justice - The respondent accused the Auditor-General of failure to give the respondent notice, whether formal or informal, of its intention to examine, inspect or audit the respondents' books, company offices and inspection sites, subsidiaries and affiliates or to interview any of the respondent's employees, for whatever purposes whatsoever, including that in its terms of reference of the special audit report under review before the National Assembly.
- e) The respondent raised further objections on account of a previous report by the Committee that indicated the company had the capacity to provide the inspection services.

Mr. Sugai further briefed the Committee as follows:

- 45. **Company Details** - EAA Company Limited was formed on 6th July 2007 and registered on 12th September 2011. Thereafter, the company changed its name and expanded its purposes to include export-inspection of used cars, evaluation work on used cars, testing and training

for used car evaluators. This enabled it to provide pre-shipment/ export inspection services to standards agencies like the Kenya Bureau of Standards (KEBS), and to participate in the Pre-Export Verification of Conformity (PVOC) to Standards Services, and to bid for such work as and when advertised.

46. **Participation in PVOC Tender** - EAA Company Limited bid in the Procurement of PVOC to Standards - Used Motor Vehicles, Mobile Equipment and Used Parts by Kenya Bureau of Standards Tender No. KEBS/T019/2017-2020 and was disqualified. The company was enjoined in an application for review of that tender/ procurement process at the Public Procurement Administrative Review Board where the application for review was dismissed and the procuring entity (KEBS) was allowed to proceed to contract the successful bidder, M/s Quality Inspection Services Inc. Japan (QISJ)
47. There were only five (5) companies offering pre-export/ pre shipment inspection of used motor vehicles, mobile equipment and used parts. The recommendations in the Special Audit Report by the Auditor General to debar two (2) of them, and to recommend only one company to offer that service to Kenya, amounted to bias, a pre-conceived report and the establishment of a monopoly. These five (5) companies are: EAA Company Limited; Quality Inspection Services Inc. Japan (QISJ); Auto Terminal Japan Limited (ATJ); JEVIC Limited; and Nippon Logistics Limited. However, KEBS had indicated that there were more than five companies that can do the job.
48. **OAG Special Audit Report, 2016** - The PIC report of 30th November 2016 had also cleared the respondent of any fraud in an earlier procurement process for the year 2014-2015, tender No. KEBS/T057/2014-2015, in its Special Audit Report dated 25th January 2016. In the Report, the Office of the Auditor General gave a clean bill of health to that procurement process, and there is thus no reason why the respondent would subsequently misrepresent facts.

Audit query

49. **Inspection Facilities in Japan** - The Audit report observed that M/s. EAA listed having (17) inspection centers in Japan in its technical proposal and a receipt as evidence of purchasing 17 inspection facilities/equipment. However, the company only provided eight lease agreements as part of the technical proposal which could not demonstrate how the 17

inspection facilities/equipment purported to have been purchased were distributed to the twelve (12) inspection centers considering there were only eight leases.

Response to the audit query

50. M/s EAA Company Limited responded by noting that the audit team sampled and visited only Yokohama, Kusakazu and Kawasaki, and stated that they were visiting for purposes of conducting due diligence on behalf of KEBS in respect of the winning bidder, QISJ. The respondent's official thus gratuitously gave out the leases the seventeen leases that were in his immediate possession, but the audit team reported only eight of them.

Audit query

51. **Lack of inspection facility and/or staff in Nagoya** - In the Nagoya region, where M/s. EAA had indicated to own an inspection facility, EAA management opted to have the team visit a leased facility from M/s. Flash Rise Limited. The lease agreement provided in the tender documents was for an existing relationship between M/s. EAA and M/s. Runglobal Co. Limited (Nagoya) instead of M/s. Flash Rise Limited. The inspection further revealed no activity by EAA and EAA Senior Management could not identify the facility they purported to have leased. It was noted that one of the inspection lines actually belonged to QISJ Inc., who was actually undertaking real-time inspection at the time of our visit on 1st March 2019. There was no presence of EAA staff noted.

Response to the audit query

52. The respondent stated that during low business season, employees do not sit around the inspection sites hence the reason why the audit team had a problem. In addition, there was no notice given to assemble the respondent's employees.

Audit query

53. **Partnership with M/s. ECL Agency Ltd** - The special audit team also sampled and engaged one of the agents according to the list of leased M/s EAA's contracts, M/s. ECL Agency Ltd. M/s. ECL Agency Ltd. actually disowned the EAA leases presented by the special audit team for verification. M/s. ECL confirmed that they did not have any lease agreements with M/s. EAA. Furthermore, ECL confirmed EAA used the staff of ECL to perform inspection service for other countries. This scenario exacerbated the doubt as to whether M/s. EAA really does inspections by itself or sub-contracts using other service providers staff.

Response to the audit query

54. Mr. Sugai stated that there was mis-communication and lack of adequate notice. M/s ECL officers speak only Japanese. Mr Kiyooki Hatano brought the audit team to M/s ECL on a courtesy call as ECL had previously done business with QISJ and that Mr. Sugai was not involved in that interaction. In addition, the confusion was caused because the audit team relied upon Mr Kiyooki Hatano to interpret for them without separately verifying what information they were being given.

Audit query

55. **Lack of Staff at Inspection Facilities** - M/s. EAA had no listing of staff assigned in Kisarazu, Kawasaki, Kitakyushu and Moji. The special audit noted there were no staff assigned to any of these regions and management noted that all the technical staff were on contract and were only on boarded when there were inspection services needed for those regions. It therefore cast doubt as to the staff capacity and equally all the accreditation attached for the key staff could not be validated as no originals/notarized copies were provided to prove the qualifications, and thus their competency.

Response to the audit query

56. Mr. Sugai observed that their capacity to deliver on any contract, if taken, is known, is tested and has been proven before.

Audit query

57. **Cancellation of M/s EAA's Accreditation** - The Auditors interviewed senior management of EAA who confirmed that their Accreditation of ISO 17020:2012 was once cancelled by Japan Accreditation Board effective 27th November 2014, for reason which management of EAA could not disclose. The special audit however noted that a new one was issued on 9th November 2016 and was valid until 31st July 2020. A search on the authenticity of the documents under the JAB website under <https://www.jab.or.jp/en/system/iso/search/> yielded no results.

Response to the audit query

58. Mr. Sugai confirmed the ISO accreditation was suspended pending investigations in 2014 but was re-instated and was available when the respondent tendered for the pertinent tender in 2017. The respondent's accreditation was verifiable from JAB website.

Audit query

59. **Potential Conflict of Interest with M/s Rosper International Limited** - The special audit also noted for potential conflict of interest between M/s. Rosper International Co. Ltd and M/s. EAA through common directorship.

In an interview with Mr. Prosper Sugai, the CEO of EAA, he stated that he was not aware of the said company nor having been involved as a director. However, a search of company records in Japan confirmed that Mr. Prosper Sugai was the owner of Rosper International Co. Ltd. for the period from 18th November 2002 to 18th August 2014.

The objectives of M/s. Rosper International Co. Ltd was listed among others as purchase and sale and export of used cars, used motorcycles and used car parts. This was a clear conflict of interest and information that was concealed to KEBS when the EAA was tendering for the past and current tender.

Response to the audit query

60. Mr. Sugai explained that there was no conflict of interest as he resigned in 2014 from Rosper International Limited and could not possibly be conflicted in the year 2017 when the respondent bid. In addition, Rosper International Limited dealt in medical equipment.

Audit query

61. **Presence of EAA in the UK** – The Audit observed that M/s EAA Company Limited had no presence in the UK. The UK Company named EAA Automobile Ltd was owned by Mr. Seth Nguku with 100 per cent shareholding when Mr. Prosper Sugai ceased to be a director of the company and transferred his shares to Mr. Nguku. This means the company was officially a standalone with no affiliation with M/s. EAA Company Limited by either common directorship or even shareholding a fact that was also misrepresented in the technical proposal as it highlighted that the EAA Automobile Ltd was a branch.

Response to the audit query

62. Mr. Sugai stated that there was no representation to the technical proposal as the respondent's bid had been determined at the preliminary stage and never proceeded to technical evaluation. Its technical qualifications were thus not evaluated. In addition, the retained a partner in the said company in the United Kingdom which was in tandem with the tender requirements.

Audit query

63. **Ownership of Inspection Facility in the UK** - It was noted that EAA did not own any inspection centers against a required one (1) owned inspection center for United Kingdom. This is despite having indicated in their proposal to have leased (2) inspection facilities at Woodhouse MOT 96A, London and Unit Tilbury Industrial, Freeport Tilbury, Essex, England RM18 7HB, in the United Kingdom, which were not verifiable.

EAA also attached a lease deed dated 1 May 2014, which seemed forged as there was no presence of EAA in the United Kingdom at the time of audit. The Port Manager of Tilbury Mr. Cox Laurence confirmed that the Company was not a tenant in any of the identified premises or facilities as indicated on the technical proposal via telecom.

Response to the audit query

64. Mr. Sugai stated that there was no forgery and had not been shown any statement from Mr Cox Laurence to verify what the audit team stated. He said that he gave information that he believed to be true to the best of its knowledge, information and belief. In addition, the technical evaluation committee never evaluated this technical requirement and there is no foundation for fraud.

Audit query

65. The Audit report noted that as part of the technical proposals, a document indicating EAA had leased Office Space in Tilbury port dated 19th August 2014, could not be verified or authenticated by the Port Manager of Tilbury Mr. Cox Laurence. The deed was signed by Mr. Christopher Boniface Lukosi. On enquiry the special audit team was informed that Mr. Christopher Boniface Lukosi was a director in both EAA and a company called Serengeti Global Services. The yard and brand at the Offices of Serengeti indicated they were involved in Sea and Coast Services.

Response to the audit query

66. Mr. Sugai explained that they had confused documents presented by Mr Lukosi who had left the company under distressful conditions and had set out to sabotage the company. The respondent had nevertheless presented valid documents which were however never evaluated by the technical evaluation committee.

Audit query

67. **Lack of Inspection Facilities and Staff in the UK** – The Auditors reported that in an interview with Mr. Prosper Sugai and Mr. Lee Sayer, it was confirmed that a visit to any of the purported Inspection Centers was not necessary on revelation that such facility did not exist because there was no reason to retain the centers when there was no business.

A request to also visit any of the purported partners of M/s. EAA was also not granted either. This confirmed that even the listed employees; one Manager Supervisor, 3 Supervisors and 6 Inspectors stationed within the United Kingdom was misrepresented by EAA in its technical proposal.

Response to the audit query

68. Mr. Sugai stated that the facility existed but staff are retained as and when business arise. The respondent had not been contracted by the KEBS and could not retain those employees by the time the audit was being done.

Audit query

69. **Presence and Ownership of Inspection Facilities in the UAE** – The Audit report noted that M/s EAA Company Limited had failed to meet the tender requirements where bidders were required to be legally registered and licensed to perform the service, and confirm if they owned inspections centers against the set criteria for UAE where subcontracting is not allowed.

Mr. Prosper Sugai, Director, EAA Company Ltd and an EAA UAE representative Mr. Rashid Abeid Suba who was not identified anywhere in the technical proposal hosted the team at location named Jabal Kilimanjaro Auto Elec. Mech.

70. Mr. Rashid Abeid Suba was the owner of M/s. Jabal Kilimanjaro Auto Elec. Mech. and is also a current Pre-Export Verifying Agent for Tanzania (TBS). TBS requirement for Pre-Export Verifying are done independently and in zones and therefore there could not have been an existing relation between M/s. Jabal Kilimanjaro Auto Elec. Mech. and M/s. EAA for purposes of this bid and being cognizant of the requirements of TBS for service providers of inspections.
71. EAA Company Ltd, provided a document which could not be verified as it purported to indicate that EAA bought the inspection facility in UAE in 2014, from M/s. Jabal Kilimanjaro Auto Elec. Mech. and entered into agreement with Mr. Rashid Abeid Suba to guide their operations, an allegation that Mr. Rashid Abeid Suba could not confirm as he owns the facility and uses it to service another contract for Tanzania

Response to the audit query

72. Mr. Sugai claimed to have presence in UAE but his bid was not evaluated by the tender evaluation committee so that there was no opinion on it, of fraud or otherwise. The audit team got Mr Rashid Abeid Suba, and did not get other officials because they did not request for an interview.
73. The respondent further stated that all documents submitted in the 2017-2020 bid were genuine and only in Japan is partnering not allowed. In any event, the evaluation committee never evaluated the documents submitted and the respondent could have answered any question posed.

Audit query

74. **Lack of presence in Thailand and South Africa** – The Audit report noted that M/s. EAA did not provide documentation to demonstrate its legality and presence in South Africa and Thailand.
75. Mr. Sugai observed that the Company had specifically indicated in its bid that it did not have offices in Thailand and South Africa but that it would sub contract its works if it won the tender. Thailand and South Africa contributed barely 1% of all second hand vehicle imports into Kenya which advised the decision to sub contract if contracted by KEBS.

Audit query

76. **Adverse Findings Against EAA in KEBS Due Diligence Report** - The special audit also noted a due diligence report dated 9th January 2015 by KEBS which highlighted among other issues; the suspension of the Company's accreditation status in Japan, the lack of a UK inspection facility in the physical address it had provided in the bid documents, and forgery of its registration documents depicting it was registered in 2013 instead of 2014.

The Due diligence report also noted that the company M/s. EAAS Limited lacked the requisite infrastructure in the UK and UAE, and that the company had presented forged and falsified documents in their bidding which enabled them to erroneously attain the minimum technical score for advancement to the financial evaluation stage. The team recommended disqualification from the procurement process and debarment from any such similar exercises by KEBS.

Response to the audit query

77. Mr. Sugai stated that M/S EAA had not received a copy of the due diligence report and they can only summarize that it was being quoted in bad faith to the exclusion of all other reports that have given it a clean bill of health.
78. The respondent denied providing false information with respect to its competence and this has been attested to by previous PIC Reports and the fact that it had been sub-contracted in 2012-2014 by QISJ to do the same work. He concluded that the findings of the Special Audit Report were biased and meant to lock the respondent out of the Kenyan market.

3.4 EVIDENCE BY AUTO TERMINAL JAPAN (ATJ) LIMITED

79. **Dr. Isaac Kalua, Africa Director for Auto Japan Co Ltd., accompanied by Mr. Philip Mutee (Auto Manager), Ms. Lena Kitavi (Communications Manager), Mr. David Kiseko (Intern), Jackson Mati (Manager, Operations) and Mr. Wilbroad Peter appeared before the Committee to adduce evidence on the Special Audit Report on the Pre-Verification of Conformity to Standards for Motor Vehicles and Used Spare Parts by Kenya Bureau of Standards.**

He briefed the Committee as follows:

Audit query

80. **Directorship of the Company** – The Audit found that M/s ATJ had provided false information in the confidential business questionnaire by listing Mr. Mamoru Fujie as the sole Director and failing to disclose details of the Company's Directors. Mr. Tetsuro Shirahama, was listed as the owner of the company with 100 percent shares, and other Directors include Dr. Isaac Kalua, Mr. Wilson Mutabazi and Mr. Nithul Lakshmanan.

Response to the audit query

81. M/S ATJ stated that Mr. Tetsuro Shirahama is the sole shareholder with 100% of shares and hence no shares were unissued; all shares are held by one person. Accordingly, Mr. Mamoru Fujie, the CEO of ATJ is also a sole Director as declared in the business questionnaire.
82. ATJ has one shareholder and one Director. This had been the case since the company started. This was similar to Kenya company culture. Kenyan laws allow a situation where a person can be a shareholder and not a director. The only difference is that there is no issued statement from the company registry in Japan for private companies regarding proprietorship. The information regarding Japanese company and number of documents to be disclosed were available on www.japanpi.blog/business-blog/japan-company-registry. (*Annexure - "List of Shareholders"*).

Audit query

83. **Ownership of Tokyo-Bay Main Office in Kisarazu** – The Audit Report observed that M/S ATJ listed a capacity of sixteen inspection lines stationed in 12 inspection centers including the Tokyo Bay Main Office. The Tokyo Bay Main Office in Kisarazu was leased through an agreement with Kisarazu Comprehensive Home Sale Commerce Housing Complex Cooperative Association. Further Analysis revealed similar arrangement with Kobe City Government. This contradicted the information provided in the technical proposal by M/s Auto terminal Japan that claimed ownership of the Tokyo Bay facility.

Response to the audit query

84. M/S ATJ stated that the property in Kisarazu was commissioned to the Company by the above referenced Housing Association since the year 2006. M/S ATJ thus claimed ownership of the facility and its operations because they purchased, installed and owned the inspection

equipment. The Housing association owns huge tracks of land in this high value area and commissioned it to specific target institutions to do complimentary business.

85. In Kobe Prefecture, M/S ATJ had a similar arrangement where Kobe City has commissioned very high value land to M/S ATJ. The office block, inspection facility including all its equipment was purchased, operated and owned by M/S ATJ. The Company noted that the land in such strategic areas like Ports in Japan is mostly managed by Government.

Audit query

86. **Use of the Tokai Facility and Functionality of the Nagoya Facility** - The Audit Report observed that the M/S ATJ Tokai Office was on a large parcel of land with other on-going logistics operations including clearing and forwarding agents. With this parcel of land being owned by M/S ATJ, it cast doubt on their involvement with only Road Worthiness Inspection of used motor vehicles for export. The Nagoya inspection facility also revealed no activity and a dilapidated structure that had seemingly been idle with no staff presence. While these had been noted to be an owned inspection center, the facility did not exhibit a state-of-the-art testing equipment as alleged in the technical proposal.

Response to the audit query

87. M/S ATJ confirmed its ownership of the Tokai inspection facility including all equipment. M/S ATJ stated that it had leased about 16,000 square meter to M/s Japan Forwarding Agency as a customs bonded area for proper utilization of the asset in a business sense. These are two different entities which operate in entirely different standards and operating procedures.

Audit query

88. **Lack of invoices confirming activity at inspection lines** – The Special Audit Report indicated that ATJ had separate lease agreements at a number of inspection lines which provided that every 10th date of the month an invoice would be raised to M/S ATJ by all these entities to confirm activity.

However, there was no documentary evidence or invoices raised by the sampled companies to M/S ATJ to validate the authenticity of the leases and inspection activity at the leased

locations which raised questions about M/S ATJ's claim in the technical proposal of undertaking 1,500 and 1,380 monthly inspections in owned and partner facility respectively.

Response to the audit query

89. M/S ATJ provided invoices from the inspection lines leased from M/s. Flash rise Co. LTD, M/s. Nagase Auto Inc, M/s. Daiei Jidousya Kogyo Co. Ltd, M/s. Hotta Auto Aichi Co. Ltd, M/s. Gulliver International Co, Ltd. M/s. Kojima Corporation and M/S. FWT Logistics Co. Ltd to confirm activity at the respective lines.

Audit query

90. **Dispute on Use of Inspection Facilities at Flashrise** – The Audit Report noted that M/S ATJ's technical proposal claimed that it had leased two inspection lines from M/S Flash rise Co. Ltd. However, during Audit it was observed that the site in question had two inspection lines; one leased to M/S ATJ and one leased to M/S QISJ.
91. M/s ATJ stated that they had two inspection lines in the same locality as submitted in the technical proposal. One inspection line was within M/S Flash Rise and a second one at a different location 300m from their Flash rise offices. The Company had a separate agreement since the physical address is different. During tendering and submission in the technical proposal, M/S ATJ submitted documents for one inspection line for this tender since second leased facility in the same inspection line had not undergone calibration process.

Audit query

92. **Engagement in Vehicle Repair Business** – M/s ATJ's license issued by the Japan's Ministry of Land, Infrastructure, Transport and Tourism (MLTT) stated that the company was in the business of maintaining motor vehicles. Additionally, the Accreditation statements by M/s. ATJ confirmed being a recipient of the Type A accreditation which gave the company the added benefit and advantage of being able to provide diagnostic services onsite. These conflicted the sworn statements, dated 7 December 2017, which were also attached stating that the company was not conflicted. This was therefore against the tender requirement where bidders were not expected to be in a conflict of interest, for this case providing diagnostic services including repair works.

Response to the audit query

93. In Japan, ISO Type A 1720 is for independent inspection company. M/s ATJ was initially accredited with ISO Type C 1720 which means an organization has an inspection company also doing additional customer related services. Upon process evaluation the IANZ (International Accreditation New Zealand) approved ISO Type A to include quarantine inspection since AutoTerminal Japan Limited does not operate works like cleaning/washing the car. At this point all inspection programme and process of AutoTerminal Japan Limited became part of Type A certification. Accordingly, M/S ATJ possess ISO Type A Accreditation license which is of the highest rank in Japan. In addition, motor vehicles repairs had its own category of license in Japan and certification and M/s ATJ was not in the business of maintaining motor vehicles.

Audit query

94. **Engagement in Export Business** – The Special Audit observed that M/s. ATJ's audited accounts for the past three years contained details relating to sales from domestic and export business. The company also disclosed that it had consumption tax receivable, often attributable to companies engaged in export business. The statements also disclosed accounts payable and receivable to companies like M/s. Japan Forwarding Agency Ltd. where the relationships could not be clearly explained by M/s. ATJ management.

Response to the audit query

95. M/S ATJ explained that the norm of the business was that automobiles predestined for export were usually in on Duty Free basis. It was only after the Roadworthiness inspection and/or the inspection and Export Declaration that their customs bond were released. This means that the automobiles are bonded items before inspection. Once the bonded custom duties are paid then the automobiles become domestic units ready for export. Usually Road Worthiness Inspection (RWI) automobiles meant for Kenya, Jamaica, Tanzania and Zambia are allocated in this category since the exporter engages in customs clearance after the "PASS" inspection. On the other hand, regarding quarantine inspection for New Zealand and Australia, M/S ATJ Limited conducts inspection after customs clearance because inspection had to be done within 21 days before shipment. Accordingly, M/s ATJ had to invoice the inspection fee to the agents of the importer. This inspection fee is including the cleaning/washing fee was operated by JFA, so JFA will bill to AutoTerminal Japan Limited for payment.

On the other hand, JFA as an agent of the importer will order for Inspection services to ATJ e.g. JFA order RWI, odometer inspection, radiation inspection etc. instead of the exporter, so AutoTerminal Japan Limited also billed to AutoTerminal Japan Limited. M/s Japan Forwarding Agency (JFA) was a customer to AutoTerminal Japan Limited.

Audit query

96. **Common Directorship at ATJ and JFA** – The Audit established that Mr. Mamoru Fujie, CEO of M/S ATJ Ltd was a director of Japan Forwarding Agency Ltd for the period from September 2013 to February 2015. This was a clear conflict of interest and this information was not disclosed to KEBS while M/S. ATJ was a service provider for the third cycle of contract between 2012-2015.

Further scrutiny revealed that ATJ had been granted a permit for customs clearance business effective 10th January 2007, by the Director of Yokohama Customs – Mr. Hiromichi Tanigawa for the Tokyo-Bay area, which exacerbated the potential conflict of interest as the said company could have been involved in export business.

Response to the audit query

97. M/S ATJ responded that M/s Japan Forwarding Agency (JFA) was established in September 2013. Upon the new requirement by KEBS in the tender, M/s AutoTerminal Japan Limited surrendered the license of Customs Clearance business to the authorities and was left with the inspection business only. It was also at this stage and moment that AutoTerminal Japan Limited was accredited with ISO17020 Type A on Nov 2013.

M/s AutoTerminal Japan Limited was an independent inspection body. The business purpose of Registration Certificate of AutoTerminal Japan Limited was clear. AutoTerminal Japan Limited was not in conflict of interest for inspection business whatsoever. In addition, the concept of “Conflict of interest” was first introduced by KEBS during this period and not earlier and therefore M/S ATJ adhered to this requirement for compliance.

98. M/s AutoTerminal Japan Limited operates in different countries globally and had never been conflicted in line of their professional undertakings whatsoever. As a sign of good faith and to comply with the “Conflict of interest” issue as defined in Kenya, Mr. Mamoru Fujie resigned from JFA directorship.

99. **Lack of Inspection Facility in the UK** – The Audit observed that M/s. ATJ didn't own any inspection centers nor had they contracted an inspection center (s) through “corporate partnerships” against the requirement for the United Kingdom where subcontracting was not allowed.

Response to the audit query

100. The Director of ATJ Limited stated that AUTO TERMINAL UK LTD was a company incorporated in by the Registrar of Companies for England and Wales as company Number 12010599. *The specifics of the audit query were not addressed by the respondent.*

Audit query

101. **Lack of Inspection Facility in the UAE** – The Audit report noted that M/s. ATJ attached a reservation name for the United Arab Emirates with no further details to demonstrate that it owned any inspection centers nor had they contracted an inspection center (s) through “corporate partnerships” against the requirement for the UAE where subcontracting was not allowed. This is despite ATJ having indicated in their proposal to own an inspection centers in the UAE which could not be verified.

There was an existing lease document as evidence of existing operations within the United Arab Emirates. The lease documents dated 27th May 2014 was signed between M/s. Green Coast Real Estate and M/s. Pal Auto Garage and signed on 1st June 2014, although it did not demonstrate any relationship with M/s. ATJ. This therefore cast doubt on the physical presence of M/s. ATJ in the UAE. While M/s. ATJ also listed Mr. Nithul Lakshmanan as a director for M/S ATJ Auto Service, it was noted he was an employee of M/s. PAL Auto Garage (PAL).

Response to the audit query

102. Dr. Kalua submitted that M/s AutoTerminal Japan Limited was a registered Company by the Government of Dubai with a professional license Number 870349 to undertake Road Worthiness Inspections. He provided the said license in his bundle of documents as annex 10.
103. Through the Tender notice, M/S AutoTerminal Japan Limited received a one month notice by KEBS to establish a company and purchase own equipment in the UK and UAE. This

being a newly introduced mandatory requirement, AutoTerminal Japan Limited through its lawyers founded the registration of ATJ in UAE and the UK ahead of the tender closure. This process has since been completed.

104. Allegations of Impropriety by the Office of the Auditor General. Dr. Kalua raised the following concerns regarding the conduct of the auditors while undertaking the audit assignment; the behaviour he believed was not expected from the Office of the Auditor General:

- a) It was unprocedural for the office of the Auditor General to use M/S QISJ in Visa applications, logistical and accommodation bookings. He tabled a letter from Jaffar Hassan (Manager of QISJ – UK Branch) addressed to the Visa Officer of the British High Commissioner Nairobi Kenya and dated 8th February 2019. This booking was done by QISJ requesting issuance of visas for the four auditors scheduled to travel to UK for audit. To Dr. Kalua, government entities should only deal with the Kenyan Embassy and not audities to avoid suspicion of bias.
- b) He further tabled an email from QISJ addressed to Ngeno J. of KEBS indicating dated 9th February 2019 indicating that QISJ had sent an invitation letters for Japan and Hotel bookings. The same email had invitation letters for UK and hotel bookings. The email further indicated that QISJ will apply for Dubai Visas on behalf of the Kenyan delegation and send them ones granted.
- c) Dr. Kalua tabled hotel booking in London Enfield Hotel for the Kenyan delegation that travelled to the UK for audit. The booking was done by Mr. Jaffar Hassan of QISJ. He further tabled hotel bookings dated 8th February 2019 for the Kenyan delegation going to Japan in JR-East Hotel Vets Yokohama Tsurumi.
- d) Dr. Kalua tabled an email from QISJ addressed to the Japan Embassy in Kenya dated 8th February 2019 inviting the Kenyan delegation to Japan for audit assignment. In the same date, the QISJ further emailed the Japanese Embssy in Kenya offering letters of guarantee and reasons for the Kenyan delegation travelling to Japan.
- e) The QISJ was notified as earlier of the impending audit assignment by Dr. Joseph Ngeno of KEBS in his email of 6th February 2019 while the M/S EAA and M/S ATJ were informed on 11th February 2019. This, to Dr. Kalua, indicated bias.

- f) The totality of the documents provided by Dr. Kalua painted the entire audit exercise as compromised by one of the competitors to the disadvantage of the others.

3.5 SUBMISSION BY THE OFFICE OF THE AUDITOR GENERAL

105. Through his letter to the Committee dated 24th March 2020, Mr. Fredrick Odhiambo (deputy Auditor General) denied the accusations from Dr. Isaac Kalua on conflict of interest when conducting the Special Audit assignment.
106. Mr. Odhimabo submitted that visa applications for OAG officials were made directly to the respective embassies in coordination with the Ministry of Foreign Affairs before travel. He provided the following documents to buttress his assertion:
- (a) Letter Ref: C.228/Vol.XVIII/(38), dated 13th February 2019 signed by Agnes C. Mita for the Auditor General and addressed to the Principal Secretary in the Ministry of Foreign Affairs requesting facilitation of issuance of entry visas to South Africa for officers scheduled to travel for Special Audit assignment.
 - (b) Letter Ref: C.228/Vol.XVIII/(39), dated 13th February 2019 signed by Agnes C. Mita for the Auditor General and addressed to the Embassy of the United Arab Emirates requesting issuance of entry visas to Dubai for officers scheduled to travel for Special Audit assignment.
 - (c) Letter Ref: C.228/Vol.XVIII/(33), dated 13th February 2019 signed by Agnes C. Mita for the Auditor General and addressed to the Principal Secretary in the Ministry of Foreign Affairs requesting facilitation of issuance of entry visas to Japan for officers scheduled to travel for Special Audit assignment.
 - (d) Letter Ref: C.228/Vol.XVIII/(36), dated 13th February 2019 signed by Agnes C. Mita for the Auditor General and addressed to the British High Commission requesting facilitation of issuance of entry visas to UK for officers scheduled to travel for the Special Audit assignment.
 - (e) Letters dated 14th February 2019 signed by Charles Kalobia of International Conformity Assessment Solutions and addressed to the head of Consular Section of the South African High Commission requesting facilitation of issuance of entry visas to South Africa for officers scheduled to travel for the Special Audit assignment.

- (f) Letter Ref: MFA.PRO 7/15/25/VOL.IX (36) dated 18th February 2019 from the Ministry of Foreign Affairs and addressed to the British High Commissioner requesting facilitation of issuance of entry visas to UK for officers scheduled to travel for Special Audit assignment.
 - (g) A proforma invoice from City Lodge Hotel Fourways dated 11th February 2019 and addressed to International Conformity Assessment Solutions indicating reservations for 5 rooms.
 - (h) A certified copy of the bank statement from Standard Chartered Bank for Mr. Fredrick Odhiambo indicating that his debit card was debited with Ksh. 94,935 from Intercontinental Yokohama Grand Yokohama (hotel). He further provided the invoice of the breakdown of the 94,935 dated 3rd March 2019. He also provided his hotel booking confirmation for Yokohama dated 24th February 2019.
 - (i) Receipts for visa processing fee to Dubai and Japan dated 28th and 22nd February 2019 respectively. The amount for Japan was 8250 while that for UAE was AED3,150.
 - (j) While confirming that indeed M/S indeed provided invitation letters to the Kenyan delegation going for Special Audit assignment, Mr. Odhiambo pointed out that the application guidelines specified the in documents to be attached including invitation letters from the institution being visited. By virtue of being the Company contracted by KEBS to provide PVOC services, QISJ provided the invitation letters for the visa applications. It is these letters that Dr. Kalua had tabled before the Committee. He dispelled fears on any conflict of interest associated with the matter.
 - (k) Mr. Odhimabo confirmed that the initial scope of the Special Audit was to focus on the winning bidder (QISJ). However, the scope of audit was expanded to include the other bidders hence the reason why QISJ it was notified earlier than the others. This was however not intended to give QISJ any undue advantage over the others.
107. KEBS obtained invitation letters and hotel bookings for Japan, United Kingdom and South Africa from QISJ and these were presented by OAG officials to the respective Embassies as required in visa application.
108. KEBS made logistical arrangements for the Auditors to visit sampled sites during the audit and OAG officials used the transport provided by each of the entities being audited to visit their respective sites.

109. The initial scope of the audit was to focus on the successful bidder, QISJ but the scope was later expanded to include all bidders in the tender under review. M/s EAA Company Limited, M/s ATJ Company Limited and M/s Nippon Corporation were thus included in the expanded audit of which the latter was not audited as they provided scanty information that was not verifiable.
110. Mr. Odhiambo underscored the fact that despite M/S QISJ made hotel reservations for the auditors, this was only meant to secure visas and that the M/S did not cater for that cost. The Office of the Auditor General met all the accommodation costs for the officials who conducted the audit and receipts to that effect were presented to the Committee.

3.6 EVIDENCE BY PUBLIC PROCUREMENT REGULATORY AUTHORITY

- 111. Mr. Maurice Juma, the Director General of the Public Procurement Regulatory Authority appeared before the Committee and later on made representations on the Special Audit Report on the Pre-Verification of Conformity to Standards for Motor Vehicles and Used Spare Parts by Kenya Bureau of Standards.**

He briefed the Committee as follows:

112. The Public Procurement Regulatory Authority had received the Special Audit Report from the Office of the Auditor General on 10th July, 2019.
113. Section 41 of the Public Procurement and Assets Disposal Act (2015) mandates the Public Procurement Regulatory Board to debar parties from participating in Public Procurement and Assets Disposal proceedings on various grounds. However, the Board was unable to process requests for debarment because Section 41 (b) of the Act provides that ‘the procedure for debarment shall be prescribed by Regulations’ and the Regulations of the Act have not been gazzeted hence all cases related to debarment were pending.
114. The Authority had received a letter from Mr. Isaac Ochieng on 13th December, 2014 requesting for debarment of M/S East Africa Automobile Services Company Limited on grounds of using fake certificates including certificates of registration in the UK and United Arab Emirates as well as tax certificate in the UK.
115. The Authority wrote to M/S East Africa Automobile Services Company on 19th January, 2015 followed by debarment sittings held on 6th May, 4th June and 10th September, 2015. The Company was represented by M/s Prof. Tom Ojienda and Advocates, while the

complainant was represented by M/s Andrew Obwayo and Company Advocates. The Company changed their advocates in the course of the debarment proceedings.

116. Further hearings were held on 1st and 26th April, 2016 but the term of the Public Procurement Advisory Board expired before the matter was concluded.
117. The Ethics and Anti-Corruption Commission were investigating the matter of the alleged fake documentation presented by M/s East Africa Automobile Services Company and had written to the PPRA on 6th February, 2018 requesting for tender documents submitted by the Company to assist in the investigation.
118. PPRA wrote a letter to KEBS on 28th February, 2020 requesting for tender documents submitted by M/s EAA Company Limited as well as the technical and financial evaluation reports for tender No. KEBS/T019-2020 that was the subject of the Special Audit Report. The Authority further requested KEBS to submit a copy of a due diligence report which had observed falsification of documents by M/s East Africa Automobile Services Company Limited.
119. The Authority had also written to the Directorate of Criminal Investigation on 25th February, 2020 seeking assistance in verifying the alleged falsification and misrepresentation of documents by the two companies.
120. The PPRA had since considered the tendering process of tender No. KEBS/T019-2021 and found it wanting. PPRA's letter to KEBS dated 21st April 2020 sought for responses on the irregularities identified within seven days. Such irregularities included:
 - a. The procurement plan was not approved by the National Standard Council hence in violation of the Section 69(2) of PPAD Act of 2015 and regulation 20(5) of the PPDA regulations of 2006. Procurement plan had been done on 2nd January 2020 while invitation to tender was done on 3rd December 2019.
 - b. Approved procurement plan by Mr. Njiraini lacked estimated cost and source of funding for the project contract to Regulation 21(1)(f) of the PPDA 2006.
 - c. The procurement was not based on indicative or approved budget contrary to Section 53(5) of the Act and the Public Procurement (Amendment) Regulations, 2013.

- d. The procurement was done without purchase requisition contrary to Section 73 of the PPAD Act, 2015 and Regulation 22 of the Public Procurement and Disposal Regulations of 2006.
- e. The tender document stifled competition
- f. Addendum 1 and 2 were signed for the Managing Director without the letter delegating that authority.
- g. The invitation to tender failed to declare that the tender was only open to those who met the requirements for eligibility and serialization of pages by the bidder contrary to Section 74(1)(h) and (i) of the PPAD Act, 2015.
- h. During tender opening, Committee members failed to record the number of pages of the bidding document as provided in Section 78 (5) of the PPAD Act and record of bid sums by the EAA and ATJ in opening of the financial proposals as required in Section 78(6)(b) of the PPAD Act, 2015.
- i. KEBS charged PE of nonrefundable fees of Kshs. 10,000 as opposed to Kshs. 1,000 contrary to Section 11(1) of Public Procurement and Disposal (Amendment) Regulations of 2013.
- j. Despite all bidders being unresponsive, the tender Committee recommended procession to technical evaluation stage contrary to Section 79(3)(b) of the PPAD Act of 2015. They further failed in the technical evaluation stage but were recommended to proceed to the financial evaluation stage contrary to Section 79(1) of the PPAD Act, 2015.
- k. Financial proposals were opened by the Evaluation Committee instead of the tender Opening Committee thus contravening Sections 46 and 78 of the PPAD Act, 2015
- l. The evaluation criteria omitted the aspect of subcontractors submitting sworn statements.
- m. KEBS failed to notify unsuccessful bidders when notifying successful ones (M/s EAA and M/s ATJ) contrary to Sections 87(3) and 126(4) of the PPAD Act, 2015.

3.7 SUBMISSION BY QUALITY INSPECTION SERVICES JAPAN (QISJ)

- 121. **Mr. Kiyako Hatano, the Managing Director of Quality Inspection Services Japan made a written submission to the Committee on the Special Audit Report on the Pre-**

Verification of Conformity to Standards for Motor Vehicles and Used Spare Parts by Kenya Bureau of Standards.

122. Quality Inspection Services Japan was a leading vehicle inspection company that had been offering roadworthiness inspection services for KEBS on three year contracts since 2012.
123. The contracts were based on competitive bidding process as per KEBS criteria and QISJ has been awarded three separate contracts by KEBS. These three contracts covered three-year cycles and the first contract was awarded on 15th January, 2012 with subsequent awards on 2nd February, 2015 and 3rd April, 2018.
124. QISJ received communication from KEBS on the scheduled audit where KEBS requested QISJ, as the current contracted service provider, to facilitate the visit by providing invitation letters to the Auditors for visa application. It is standard procedure for most countries to request invitation letters and hotel bookings during visa application. In Japan, there was an additional mandatory requirement of an undertaking in the form of a guarantee covering any liability that may be occasioned by the visitor to the institution being visited. QISJ provided these documentations as obliged.
125. While QISJ made the hotel bookings, the Auditors were to pay for their hotel expenses and QISJ did not make any payment for the Auditors during the audit process. QISJ therefore did not influence the auditors in any way.
126. The communication between KEBS and QISJ were not done in secrecy and were purely for the purpose of visa application to enable the auditors to conduct the audit. The manner in which ATJ accessed confidential communication between QISJ and KEBS should be disclosed.

CHAPTER FOUR

4.1 COMMITTEE OBSERVATIONS AND FINDINGS

In its consideration of the Special Audit Report on Procurement of Pre-Export Verification of Conformity (PVOC) to Standard Services for Used Motor Vehicles, Mobile Equipment and Used Spare Parts by Kenya Bureau of Standards, the Committee made the following observations and findings:

4.2 General Observations

- (1) KEBS PVOC Programme was started on 29th September, 2005 by KEBS, through the publication of Legal Notice No. 78 of 15th July, 2005.
- (2) Inspection of vehicles and spare parts at the country of origin is conducted by third party agencies on behalf of KEBS in three-year inspection cycles.
- (3) An international tender for provision of pre-export verifications to conformity to standard: Used Motor Vehicles, Mobile Equipment and used Spare parts was advertised on 21st November, 2017 – Tender Number: KEBS/T019/2017-2021. Four firms responded to the bid i.e. M/S Nippon Inspection Centre Corporation, M/S Auto Terminal Japan (ATJ) Ltd, Quality Inspection Services Inc. Japan (QISJ) and EAA Company Ltd.
- (4) M/S Nippon Inspection Centre Corporation and M/S EAA Company Limited were disqualified at the preliminary evaluation stage for failure to provide relevant documentation required for the tender. M/S Nippon only provided a certificate of incorporation and details of the company directors. M/S EAA failed to provide a number of documents including copies of its current tax compliance certificate, licenses to operate in Japan, UK and United Arab Emirates, proof of financial strength and sworn statement that the company had not filed for bankruptcy.
- (5) M/S Auto terminal Japan Ltd and M/S Quality Inspection Services Inc. Japan were responsive to all the requirements of preliminary evaluation hence proceeded to the technical evaluation stage.
- (6) M/S Auto Terminal Japan (ATJ) was disqualified at the technical evaluation stage due to several reasons including lack of title/lease for inspection centres, lack of ownership

documents for inspection equipment, lack of requisite number of certified inspectors, among others.

- (7) M/S Auto Terminal Japan (ATJ) Ltd filed an appeal to the Public Procurement Administrative Review Board (PPARB) seeking for re-evaluation of the technical proposals on Section 2.22.1 of the tender document to ensure fairness and non-discrimination of the evaluation criteria.
- (8) PPARB dismissed the application by M/S ATJ Ltd indicating that the company did not meet the technical evaluation requirements and that KEBS was directed to proceed with the procurement process.
- (9) Consequently, KEBS and Quality Inspection Services Inc. Japan (QISJ) entered into a contract agreement on 3rd April, 2018 for a period of 3 years effective 15th April, 2018.
- (10) KEBS has an existing contract with Quality Inspection Services Japan (QISJ) for pre-export inspection of motor vehicles. The existing contract is for the current three-year cycle of inspection before a new tender is floated.
- (11) Subject to the provisions of Article 252 (1) and Article 229 (6) of the Constitution of Kenya and Section 38 of the Public Audit Act, the Office of the Auditor-General conducted a special audit at Kenya Bureau of Standards (KEBS) with a focus on the procurement of Pre-Export Verification of Conformity (PVOC) to Standards Services – For used Motor Vehicles, Mobile Equipment and Used Spare Parts by KEBS – Tender Number: KEBS/T019/2017-2020. The report was tabled in the National Assembly on 23rd November, 2019.
- (12) The Auditors conducted site visits in three out of the four firms that bid for the tender i.e. Quality Inspection Services Japan, EAA Company Ltd and M/S Auto Terminal Japan Ltd. M/S Nippon Inspection Center Corporation, the fourth firm, did not respond to a request for a meeting with the Auditors.
- (13) During the site visits, the Auditors focused on review of documents provided versus the evidence availed by the bidders so as to corroborate the physical and technical infrastructure required to satisfactorily perform the work.
- (14) The Audit established that M/S Auto Terminal Japan did not have the physical and technological infrastructure to perform the inspection service under this tender in the United Kingdom, Japan and United Arab Emirates. The Company had further grossly

misrepresented its technical proposal and recommended its debarment for contravening Section 41 (1) (h) of the Public Procurement and Disposal Act, 2015.

- (15) M/S ATJ was further found to have contravened the ethos of the sworn statement by the Managing Director that the company or its associated companies was not involved in any business that might lead to a conflict of interest and that the tenderer had given full disclosure of its directors and associated companies. The Auditors questioned the overall authenticity and validity of the documentation provided by the company in its bid for the tender.
- (16) The Special Audit Report observed that M/S EAA Company Limited had been knowingly providing falsified documents in the past and continues to do so in its bid for KEBS tenders. The Audit cited a KEBS due diligence report on M/S EAA Company Limited dated 9th January 2015 that had flagged the Company as having forged registration documents and that it did not actually exist in the UK physical address provided in its bid.
- (17) M/S EAA was further found to lack the physical and technological infrastructure to perform the inspection service under this tender in the United Kingdom, Japan and United Arab Emirates. The Company had further grossly misrepresented its technical proposal and should be subjected to proceedings of the law having contravened Section 41 (1) (h) of the Public Procurement and Disposal Act, 2015.
- (18) The Special Audit Report recommended institution of debarment process against M/S Auto Terminal Japan and M/S EAA Company Limited due to their fragrant violation of the provisions of the procurement law.
- (19) The Public Procurement Regulatory Authority had received the Special Audit Report from the Office of the Auditor General on 10th July, 2019.
- (20) Despite being aware of the existence of the Special Audit Report from as earlier as 10th July 2019, the PPRA did not act on the recommendations of the said report. It was not until invited to appear before the Committee that PPRA swung into action by initiating investigations. They did this by writing to KEBS on 28th February, 2020 requesting for tender documents submitted by M/s EAA Company Limited as well as the technical and financial evaluation reports for tender No. KEBS/T019 that was the subject of the Special Audit Report. The Authority further requested KEBS to submit a copy of a due

diligence report which had observed falsification of documents by M/s East Africa Automobile Services Company Limited.

- (21) Section 41 of the Public Procurement and Assets Disposal Act (2015) mandates the Public Procurement Regulatory Board to debar parties from participating in Public Procurement and Assets Disposal proceedings on various grounds. However, the Board has not been able to process requests for debarment because Section 41 (b) of the Act provides that '*the procedure for debarment shall be prescribed by Regulations*' and the Regulations of the Act have not been gazzeted hence all cases related to debarment are pending.
- (22) The Authority had received a letter from Mr. Isaac Ochieng on 13th December, 2014 requesting for debarment of M/S East Africa Automobile Services Company Limited on grounds of using fake certificates including certificates of registration in the UK and United Arab Emirates as well as tax certificate in the UK. The Authority initiated debarment proceedings by holding sittings on various occasions from 6th May, 2015 to 26th April, 2016 but the term of the Public Procurement Advisory Board expired before the matter was concluded.
- (23) The Ethics and Anti-Corruption Commission was investigating the matter of the alleged fake documentation presented by M/s East Africa Automobile Services Company and had written to the PPRA on 6th February, 2018 requesting for tender documents submitted by the Company to assist in the investigation.
- (24) The Authority had also written to the Directorate of Criminal Investigation on 25th February, 2020 seeking assistance in verifying the alleged falsification and misrepresentation of documents by the two companies.
- (25) As at the time of compiling this report, there was no indication from PPRA that and the DCI that they had concluded investigating the matter. Further, the Cabinet Secretary for the National Treasury had not gazzeted debarment regulations contemplated in Section 41 of the Public Procurement and Asset Disposal Act of 2015. Absence of these regulations held back the PPRA from commencing any debarment proceedings.

4.3 Summary Findings on KEBS Tender T010-2019-2020

- (26) On 3rd December 2019, KEBS advertised a tender for enlargement of provision of PVOC services to bring on additional service providers. The tender KEBS/T010-2019-2021 was advertised in the Daily Nation, the Standard and MyGov website. Limiting the advertisement of an international tender to two local dailies and the MyGov website might have restricted the reach of the tender notice and limited the number of bidders responding to the tender.
- (27) KEBS stated that the rationale for expanding the contract was to mitigate against the risk of relying on one service provider and the imminent exposure in case of dispute or lack of performance by the existing service provider.
- (28) Three companies submitted their bids for the tender including the two companies flagged by the Auditor General in the Special Audit Report for misrepresenting facts in technical proposals, falsifying documents and lacking the requisite physical and technological capacity to carry out the service - M/S Auto Terminal Japan Limited and M/S EAA Company Limited.
- (29) Following preliminary, technical and financial evaluation of the bids, the Tender evaluation committee recommended the award of the international tender KEBS/T010-2019-2021 for Enlargement of Provision of Pre-Export Verification of Conformity(PVOC) to Standards services for used motor vehicles, mobile equipment and spare parts to EAA Company Limited and Auto Terminal Japan Limited who scored the required overall score of 90.7 and 90.9 marks respectively, out of a maximum 100 points, subject to the undertaking of due diligence and consideration of the report confirming and verifying the qualifications of the tenderers.
- (30) In the month of February 2029, the Committee met with the management of KEBS to consider the Special Audit Report. In the said meeting, it emerged that KEBS was processing another contract for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to Standards services for used motor vehicles, mobile equipment and spare parts. The Committee produced a progress report and tabled it advising KEBS to seek the AG's opinion and also the Committee's recommendations of the National Assembly on the Special Audit Report .

- (31) KEBS Management had shown inconsistencies in the information that it had provided to the Committee. The Managing Director indicated that KEBS had not tendered for the expansion of the contract but had conducted a pre-qualification of service providers before later admitting that they advertised for a tender when documentary evidence to that effect was provided.
- (32) The KEBS sought a legal opinion from the firm of Iseme Kamau and Maema Advocates on the legal implications of procuring additional partners for the PVOC services. The firm opined that the expansion of the terms of the existing contract by bringing in additional partners would amount to splitting of the existing contract contrary to Section 54 (1) of the PPAD Act.
- (33) The Advocates further opined that the proposed tender for additional partner would be subject to challenge unless KEBS could demonstrate procurement planning that would justify the splitting of the services under the existing contract.
- (34) During the second meeting with KEBS, KEBS informed the Committee that Management was in receipt of another legal opinion dated 19th February, 2020. In this opinion, the Advocates advised KEBS that the proposed tender was justifiable and entitled to proceed to its lawful conclusion unless barred by the PPARB or any other lawful process.
- (35) It was not clear why the KEBS management opted to seek the legal advice of their external firm of advocates on the matter and not use the services of the Attorney General thereby incurring a nugatory expenditure.
- (36) The Management of KEBS had belatedly got legal advice from the Office of the Attorney General on the legal implications of expanding the PVOC contract. In his opinion to the KEBS Managing Director, Lt. Col (Rtd.) Bernard Njiraini, Ref: AG/CONF/2/C/78 VOL.1 (75) and dated 26th March 2020, (the same letter was confirmed to the Committee to be authentic by the Attorney General through his letter dated 28th April 2020 and Ref: AG/CONF/2/C/78 VOL.1 (75)) the Hon. Attorney General raised a myriad of issues regarding the tender to wit:
- (a) KEBS had indicated in its previous communications to the Attorney General that it was doing addenda to the existing contract only to be discovered through

KEBS letter to Attorney General dated 21st February 2020 that this was a fresh tender process for enlargement of the services.

- (b) It was unclear whether the fresh procurement process was related to the draft addenda to the five executed contracts forwarded to the Attorney General's office in a letter dated 2nd January 2020.
 - (c) Section 139 of the Public Procurement and Asset Disposal Act of 2015 that guides on variation of contracts did not anticipate floating of a new tender to amend existing contracts. Any new tender should culminate in signing of a new contract and not variation of the existing contract.
 - (d) The KEBS letter to Attorney General dated 21st February 2020 indicated that the tender process had been challenged before the PPRA and the High Court as well as the matter being investigated by the Public Investments Committee of the National Assembly. While PPRA heard and dismissed the petition filed by the Niavana Agencies limited, KEBS did not submit any document to the Attorney General on the matter before the High Court and also the issues that were being canvassed before the Public Investments Committee.
 - (e) The totality of the Attorney General's submission was that the KEBS misrepresented fact to his office that matter in question was for addenda to the existing contract when it was indeed it was a fresh tender and that KEBS had failed to disclose to the Attorney General that the tender had been challenged in Court, was being investigated by the Public Investments Committee and the exact relationship of the fresh procurement and the five addenda.
- (37) Kenya Bureau of Standards Management had proceeded with the tender for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) services despite adverse findings on previous bidders in the Special Audit Report. The tender was advertised after the Special Audit Report was tabled in the National Assembly and the same companies that had been adversely mentioned in the Special Audit Report ended up being recommended for tender award by KEBS Tender Evaluation Committee.
- (38) M/S EAA Company Limited went to Court regarding the matter with a view to stopping the National Assembly from considering the Special Audit Report. The Judicial Review

Miscellaneous Application (*No. 39 of 2020 – EAA Company Limited vs. The Office of the Auditor General, Clerk of the National Assembly and the National Assembly*) was filed in court on 14th February, 2020. The orders specifically sort against the National Assembly are, orders prohibiting the House from hearing in respect of, debating, adopting and/or enforcing, or causing the enforcement of, the Auditor General's Special Audit Report.

- (39) The petitioner later withdrew the suit against the National Assembly but the case against the Auditor General remained.
- (40) The PPRA had since considered the tendering process of tender No. KEBS/T019-2020 and issued a preliminary report raising several issues through its letter to KEBS Ref: PPRA/CIED/4/30/65 VOL.IV (65) dated 21st April 2020. In the said letter, PPRA sought for responses on the irregularities identified within seven days. The authenticity of the said letter was confirmed to the Committee by the PPRA through its letter Ref: PPRA/CIED/4/30/65 VOL.IV (72) dated 30th April 2020 with a rider that the PPRA had not produced its final report on the matter. Some of the irregularities identified by PPRA during the procurement process included:
 - a. The procurement plan was not approved by the National Standard Council hence in violation of the Section 69(2) of PPAD Act of 2015 and regulation 20(5) of the PPDA regulations of 2006. Procurement plan had been done on 2nd January 2020 while invitation to tender was done on 3rd December 2019.
 - b. Approved procurement plan by Lt. Col (Rtd.) Bernard Njiraini lacked estimated cost and source of funding for the project contract to Regulation 21(1)(f) of the PPADA 2006.
 - c. The procurement was not based on indicative or approved budget contrary to Section 53(5) of the Act and the Public Procurement (Amendment) Regulations, 2013.
 - d. The procurement was done without purchase requisition contrary to Section 73 of the PPAD Act, 2015 and Regulation 22 of the Public Procurement and Disposal Regulations of 2006.

- e. The tender document stifled competition
- f. Addendum 1 and 2 were signed for the Managing Director without the letter delegating that authority.
- g. The invitation to tender failed to declare that the tender was only open to those who met the requirements for eligibility and serialization of pages by the bidder contrary to Section 74(1)(h) and (i) of the PPAD Act, 2015.
- h. During tender opening, Committee members failed to record the number of pages of the bidding document as provided in Section 78 (5) of the PPAD Act and record of bid sums by the EAA and ATJ in opening of the financial proposals as required in Section 78(6)(b) of the PPAD Act , 2015.
- i. KEBS charged PE of nonrefundable fees of Kshs. 10,000 as opposed to Kshs. 1,000 contrary to Section 11(1) of Public Procurement and Disposal (Amendment) Regulations of 2013.
- j. Despite all bidders being unresponsive, the tender Committee recommended procession to technical evaluation stage contrary to Section 79(3)(b) of the PPAD Act of 2015. They further failed in the technical evaluation stage but were recommended to proceed to the financial evaluation stage contrary to Section 79(1) of the PPAD Act, 2015.
- k. Financial proposals were opened by the Evaluation Committee instead of the tender Opening Committee thus contravening Sections 46 and 78 of the PPAD Act, 2015
- l. The evaluation criteria omitted the aspect of subcontractors submitting sworn statements.
- m. KEBS failed to notify unsuccessful bidders when notifying successful ones (M/s EAA and M/s ATJ) contrary to Sections 87(3) and 126(4) of the PPAD Act, 2015.

4.4 Summary of Findings on M/s EAA Company Limited

- (41) M/S EAA raised preliminary objections on the jurisdiction of the Committee to consider the impugned special Audit report on the basis that the said report was not publicized by the Auditor General upon its conclusion; was way past the time allowed under Article 229(8) of the Constitution and fair hearing.

After consideration of all the preliminary objections and construction of the Constitution purposely, the Committee was of the view that it could not have been the intention of the Kenyan People to provide rigid timelines in consideration of audit reports from the Auditor General by the National Assembly. Many factors may lead to delay of consideration of such reports and as such, they should not lapse simply because of the rigidity of time.

On the issue of want of fair hearing, the Committee duly gave M/S EAA an opportunity to be heard and its on the basis of such deliberations that will inform the final decision upon and not necessarily the recommendations of the Auditor General in the Special Audit Report whether or not the Auditor General had reasonably heard from the other witnesses.

- (42) At the time of registration of EAA Company Limited, Mr. Prosper Guku was the sole shareholder but he has since relinquished 50% of the shareholding.
- (43) The Company submitted documentation indicating that they had 17 inspection lines but confirmed that they had only provided lease agreements for 8 plants.
- (44) For the Nagoya plant, EAA provided a lease contract with M/s RunGlobal Ltd yet the plant visited by the Auditors during inspection was owned by M/s Flashrise Ltd. The Auditor confirmed that they visited the site with EAA Employee who spoke fluent English, contrary to claims by EAA that the employees only spoke Japanese.
- (45) The leases provided by M/S EAA Company Ltd. in their bid differed from the leases provided during the meeting.
- (46) M/s ECL Limited, the alleged Lessor of the inspection plant in Kobe-Rokko denied having a lease agreement with EAA Company Limited and further disowned the documents signed by a Director Kiichiro Kichise. ECL stated that they neither had a lease agreement with EAA nor had a Director by the name Kiichiro Kichise.

- (47) M/S EAA Company Limited tabled a further lease agreement for the Kobe-Rokko inspection plant where M/s HAMANAS Company had allegedly leased the plant to EAA Company Limited.
- (48) M/S EAA Company had its accreditation suspended in 2014. The Auditors differed with the company on the duration of the suspension. It was confirmed that they were given new accreditation in 2014.
- (49) M/s Rosper International Limited, of which Mr. Sugai is a Director, was registered as a company that provides motor vehicle export services, among other services. Mr. Sugai stated that he had resigned from the company in 2007 and that the company had not exported any vehicles.
- (50) Mr. Sugai explained that there was no conflict of interest as Mr. Sugai resigned in 2014 and not 2017 as he had indicated in his submission from Rosper International Limited and could not possibly be conflicted in the year 2017 when the respondent bid. In addition, Rosper International Limited dealt in medical equipment.
- (51) Though Mr. Sugai denied forging any document and had not been shown any statement from Mr Cox Laurence, the due diligence done by KEBS in 2015 confirmed the alleged forgery therefore in concurrence with the audit observation.
- (52) Mr. Sugai's assertion that all documents submitted in the 2017-2020 bid were genuine and that it was only in Japan in which partnering was not allowed was contrary to the PIC report findings of 30th November 2016.
- (53) M/S EAA Company acknowledged that they do not own or lease the UK inspection plant as stated in their bid. The UK plant is owned by M/s EAA Automobile Ltd. which has no legal relation with M/s EAA Company Limited. Mr. Sugai explained that the UK does not allow Japanese citizens to open a company hence Mr. Sugai transferred ownership of the company to his brother, Mr. Seth Nguku.
- (54) EAA denied having taken the Auditors to the offices of Serengeti Company in the UK despite the Auditor's confirmation of pictorial evidence to prove the visit took place.
- (55) The Auditors could not confirm the technical capacity of key officer at EAA Company Ltd. submitted in their bid as the officers failed to avail themselves for interviews during the audit.

- (56) There was no evidence provided by M/s EAA Company Limited on ownership of an inspection line in the United Arab Emirates. There was no evidence provided to show that EAA Company Limited bought an inspection facility from M/s Jabal Kilimanjaro as stated by Mr. Sugai.
- (57) There was no evidence provided to indicate presence of M/s EAA Company limited in Thailand and South Africa as per the minimum requirement set by KEBS for participating in the tender.
- (58) M/S EAA denied knowledge of a KEBS Due Diligence Report that flagged the Company as having knowingly falsified documents and that KEBS had recommended the Company for debarment.
- (59) The Public Procurement Regulatory Authority had not instituted debarment proceedings in line with the recommendations of the KEBS Due Diligence Report on EAA Company Limited. This was due to the absence of Public Procurement regulations that inhibit the full operationalization of the Public Procurement and Disposal Act (2015) with regards to debarment of entities.
- (60) The Public Procurement Regulations have not been gazetted and cases relating to debarment of entities that engage in procurement irregularities have been pending since enactment of the PPDA in 2015. The Regulations have been considered by both Houses of Parliament and was under consideration by the Cabinet.

4.5 Summary of Findings on M/s Auto Terminal Japan Limited

- (61) M/s Auto terminal Japan limited has one shareholder and one Director. This has been the case since the company started. This is similar to Kenya company culture. Kenyan laws allow a situation where a person can be a shareholder and not a director. The only difference is that there is no issued statement from the company registry in Japan for private companies in regard to proprietorship.
- (62) The Tokyo Bay Main Office in Kisarazu was leased through an agreement with Kisarazu Comprehensive Home Sale Commerce Housing Complex Cooperative Association. Further Analysis revealed similar arrangement with Kobe City Government.

- (63) The property in Kisarazu was commissioned to the Company by the above referenced Housing Association since the year 2006. ATJ thus claimed ownership of the facility and its operations because they purchased, installed and own the inspection equipment.
- (64) M/s ATJ confirmed its ownership of the Tokai inspection facility including all equipment. ATJ stated that it had leased about 16,000 sqm to M/s Japan Forwarding Agency as a customs bonded area for proper utilization of the asset in a business sense. These are two different entities which operate in entirely different standards and operating procedures.
- (65) M/s ATJ provided invoices from the inspection lines leased from M/s. Flash rise Co, LTD, M/s. Nagase Auto Inc, M/s. Daiei Jidousya Kogyo Co Ltd, M/s. Hotta Auto Aichi Co, Ltd, M/s. Gulliver International Co, Ltd. M/s. Kojima Corporation and M/s. FWT Logistics Co, Ltd to confirm activity at the respective lines. The auditors had however not seen them and could not be verified
- (66) M/s ATJ stated that they have two inspection lines in the same locality as submitted in the technical proposal. One inspection line is within M/S Flash Rise and a second one at a different location 300m from their Flash rise offices. The Company has a separate agreement since the physical address is different. During tendering and submission in the technical proposal, M/s ATJ submitted

- (67) documents for one inspection line for this tender since second leased facility in the same inspection line had not undergone calibration process.
- (68) In Japan, ISO Type A 1720 is for independent inspection company. M/s ATJ was initially accredited with ISO Type C 1720 which means an organization has an inspection company also doing additional customer related services. Upon process evaluation the IANZ (International Accreditation New Zealand) approved ISO Type A to include quarantine inspection since AutoTerminal Japan Limited does not operate works like cleaning/washing the car. At this point all inspection program and process of AutoTerminal Japan Limited became part of Type A certification. Accordingly, M/s ATJ possess ISO Type A Accreditation license which is of the highest rank in Japan. In addition, motor vehicles repairs have its own category of license in Japan and certification and M/s ATJ is not in the business of maintaining motor vehicles.
- (69) M/s ATJ explained that the norm of the business is that automobiles predestined for export are usually in on Duty Free basis. It is only after the Roadworthiness inspection and/or the inspection and Export Declaration that their customs bond are released. This means that the automobiles are bonded items before inspection. Once the bonded custom duties are paid then the automobiles become domestic units ready for export. Usually Road Worthiness Inspection (RWI) automobiles meant for Kenya, Jamaica, Tanzania and Zambia are allocated in this category since the exporter engages in customs clearance after the "PASS" inspection.
- (70) On the other hand, regarding quarantine inspection for New Zealand and Australia, M/s ATJ Limited conducts inspection after customs clearance because inspection has to be done within 21 days before shipment. Accordingly, M/s ATJ has to invoice the inspection fee to the agents of the importer. This inspection fee is including the cleaning/washing fee is operated by JFA, so JFA will bill to AutoTerminal Japan Limited for payment.
- (71) On the other hand, JFA as an agent of the importer will order for Inspection services to ATJ e.g. JFA order RWI, odometer inspection, radiation inspection etc. instead of the exporter, so AutoTerminal Japan Limited also bills to AutoTerminal Japan Limited. M/s Japan Forwarding Agency (JFA) is a customer to AutoTerminal Japan Limited.

- (72) M/s Japan Forwarding Agency (JFA) was established in September 2013. Upon the new requirement by KEBS in the tender, M/s AutoTerminal Japan Limited surrendered the license of Customs Clearance business to the authorities and was left with the inspection business only. It is also at this stage and moment that AutoTerminal Japan Limited was accredited with ISO17020 Type A on Nov 2013.
- (73) M/s AutoTerminal Japan Limited is an independent inspection body. The business purpose of Registration Certificate of AutoTerminal Japan Limited is clear. AutoTerminal Japan Limited is not in conflict of interest for inspection business whatsoever. In addition, the concept of “Conflict of interest” was first introduced by KEBS during this period and not earlier and therefore ATJ adhered to this requirement for compliance.
- (74) M/s AutoTerminal Japan Limited operates in different countries globally and has never been conflicted in line of their professional undertakings whatsoever. As a sign of good faith and to comply with the “Conflict of interest” issue as defined in Kenya, Mr. Mamoru Fujie resigned from JFA directorship as evidenced by attached
- (75) The Director of ATJ Limited stated that AUTO TERMINAL UK LTD is a company incorporated in by the Registrar of Companies for England and Wales as company Number 12010599. (Annexure (ATJ –UK) is attached as Certificate of Incorporation of a Private Limited Company in UK).
- (76) The respondent stated that M/s AutoTerminal Japan Limited Auto Services is a registered Company by the Government of Dubai with a professional license Number 870349 to undertake Road Worthiness Inspections (Annexure number 10 is attached as ATJ Auto Services -UAE).
- (77) On dispute on use of Inspection Facilities at Flashrise – Mr. Kalua failed to explain himself on the issue.
- (78) Through the Tender notice, Auto Terminal Japan Limited received a one month notice by KEBS to establish a company and purchase own equipment in the UK and UAE. This being a newly introduced mandatory requirement, AutoTerminal Japan Limited through its lawyers founded the registration of ATJ in UAE and the UK ahead of the tender closure. This process has since been completed. The Committee however found out that the incorporation certificate submitted by M/S ATJ on 11th December 2017

was not authentic after Dr. Kalua confirmed that the Company was incorporated in UK on 22nd May 2019 under certificate No. 12010599. This vindicates the audit observation on lack of presence of M/S ATJ in both UAE and UK and forgery of documents.

- (79) M/s Auto Terminal Japan accused the Auditor General of impropriety by alluding to facilitation of the Auditor by one of the companies under the Audit which could influence the findings of the Audit. The allegations were however proved to be unfounded as the Office of the Auditor General provided receipts of their accommodation and confirmed that their visa application was facilitated by KEBS.
- (80) On the accusations from the Office of the Auditor General by Dr. Isaac Kalua on the alleged conflict of interest from the Office of the Auditor General during the period of conducting the Special Audit, Mr. Fredrick Odhiambo (deputy Auditor General) denied all the allegations. The allegations are dealt with hereunder.
- (81) On the allegation that M/S QISJ assisted the OAG in visa applications, logistical and accommodation bookings- Dr. Kalua had tabled documents including email copies of communication between KEBS Officials and QISJ officials on facilitating visa arrangements for the Office of the Auditor General officials visiting QISJ facilities for the audit. He further tabled hotel bookings of OAG officials allegedly made by QISJ officials.
 - i. Mr. Odhiambo acknowledged that it was indeed true that M/S QISJ wrote invitation letters for the Auditors. He however indicated that it was a requirement from Japan, UAE, South Africa and UK that the institution to be visited had to provide invitation letters to those intending to visit its institution for purposes of visa processing.
 - ii. The visa applications for OAG officials were made directly to the respective embassies in coordination with the Ministry of Foreign Affairs before travel. The application guidelines specified the documents to be attached including invitation letters from the institution being visited. By virtue of being the Company contracted by KEBS to provide PVOC services, QISJ provided the invitation letters for the visa applications.

- iii. He further submitted that the initial scope of audit to be limited to M/S QISJ alone as it had a running contract with KEBS but the scope changed to include the rest of the bidders hence the reason why M/S was engaged to, through the advice of KEBS, to provide invitation letters.
 - iv. Mr. Odhiambo submitted that the visa processing fees for the auditors was paid by the Office of the Auditor General and provided receipts on the same.
 - v. Mr. Odhiambo produced several letters from the Office of the Auditor General to the Ministry of Foreign Affairs and a Norte from the Ministry of Foreign Affairs requesting issuance of visas to auditors.
- (82) On the allegation that M/S QISJ met accommodation costs for some auditors, Mr. Odhiambo refuted that claim by producing a certified copy of his bank statement from Standard Chartered bank showing that he paid for his bills while in Japan with his debt card. He further produced evidence to the effect that he stayed in Intercontinental Grand Yokohama and not as per the hotel bookings.
- (83) KEBS made logistical arrangements for the Auditors to visit sampled sites during the audit and OAG officials used the transport provided by each of the entities being audited to visit their respective sites.
- (84) The latter information of the of M/S EAA and other bidders of the auditors' proposed audit assignment arose from change of scope of audit exercise and not intended to give M/S QISJ undue advantage.
- (85) It was the Committee's conclusion that all the allegations against the office of the Auditor General were unfounded as all of them were satisfactorily controverted.

CHAPTER FIVE

5.0 COMMITTEE RECOMMENDATIONS

The Committee made the following recommendations having received submissions by the aforementioned entities on its consideration of the Special Audit Report on Procurement of Pre-Export Verification of Conformity (PVOC) to Standard Services for Used Motor Vehicles, Mobile Equipment and Used Spare Parts by Kenya Bureau of Standards:

- i. In line with the recommendations of the Auditor General in the Special Audit Report dated 10th July 2019, KEBS' due diligence report on Tender No. KEBS/T057/2014-2015, and the findings of this Committee, the Public Procurement Regulatory Board, pursuant to section 41 of the Public Procurement and Asset Disposal Act (No 33 of 2015,) and Regulation No. 22 of the Public Procurement and Asset Disposal Regulations, 2020, immediately commences debarment proceedings against M/S EAA and MS ATJ for violating the Public Procurement and Asset Disposal Act in TENDER No. KEBS/T019/2017/2020 and Ms. EAA in Tender No. KEBS/T057/2014-2015.
- ii. The Managing Director for KEBS, Lt. Col (Rtd.) Bernard Njiraini, should be held personally responsible for failing to seek the legal opinion from the Attorney-General in time; withholding and/ or giving misleading information from the Attorney General when he belatedly sought such opinion contrary to Section 134 of the Public Procurement And Asset Disposal Act 2015; ignoring the Public Investments Committee's advisory to seek and follow the Attorney's General's legal opinion before awarding the tender No. KEBS/T019-2020; and an earlier opinion from KEBS' external lawyer Ref: STA-005-0184 dated 20th June 2017 and internal legal team.
- iii. The Managing Director for KEBS, Lt. Col (Rtd.) Bernard Njiraini, should be personally held responsible for any loss that KEBS may make arising from litigations associated with award of tender No. KEBS/T019-2020. Potential areas of litigations may include:
 - (a) Failure to have procurement plan approved by the National Standard Council before invitation to tender contrary to Section 69(2) of PPAD Act of 2015 and regulation 20(5) of the PPDA regulations of 2006.

- (b) Procuring without indicative or approved budget contrary to Section 53(5) of the Public Procurement and Disposal Act and the Public Procurement (Amendment) Regulations, 2013.
- (c) Procuring without purchase requisition contrary to Section 73 of the PPAD Act, 2015 and Regulation 22 of the Public Procurement and Disposal Regulations of 2006.
- (d) Failure to declare in the invitation to tender that the tender was only open to those who met the requirements for eligibility and serialization of pages by the bidder contrary to Section 74(1)(h) and (i) of the PPAD Act, 2015.
- (e) During tender opening, Committee members failed to record the number of pages of the bidding document as provided in Section 78 (5) of the PPAD Act and record of bid sums by the EAA and ATJ in opening of the financial proposals as required in Section 78(6)(b) of the PPAD Act , 2015.
- (f) Charging of PE of nonrefundable fees of Kshs. 10,000 as opposed to Kshs. 1,000 contrary to Section 11(1) of Public Procurement and Disposal (Amendment) Regulations of 2013.
- (g) Approving a recommendation from the tender Committee that all bidders proceed to technical evaluation stage despite being unresponsive contrary to Section 79(3)(b) of the Public Procurement Asset Disposal Act of 2015. They further failed in the technical evaluation stage but were recommended to proceed to the financial evaluation stage contrary to Section 79(1) of the PPAD Act, 2015.
- (h) Financial proposals were opened by the Evaluation Committee instead of the tender Opening Committee thus contravening Sections 46 and 78 of the PPAD Act, 2015
- (i) Failure to notify unsuccessful bidders when notifying successful ones (M/s EAA and M/s ATJ) contrary to Sections 87(3) and 126(4) of the PPAD Act, 2015.
- (j) Section 139 of the Public Procurement and Asset Disposal Act of 2015 that guides on variation of contracts did not anticipate floating of a new tender to

amend existing contracts. Any new tender should culminate in signing of a new contract and not variation of the existing contract.

- iv. The Ethics and Anti-Corruption Commissions (EACC) investigates the circumstances under which KEBS entered into a contract with MS/EAA Company Limited and M/S Auto Terminal Japan and submits its findings hereon to the National Assembly within sixty (60) days of adoption of this Report.
- v. KEBS should always as much as possible ensure full implementation of future contractual obligations KEBS enters to avoid unnecessary litigations and loss of public resources.
- vi. Future international tenders should be widely advertised in leading international media houses to enable fair competition and service providing.
- vii. The Public Procurement and Regulatory Authority (PPRA) expeditiously investigates the entire tendering process under tender No. KEBS/T019-2020 and report its findings to the National Assembly, DCI, and DPP within thirty (30) days of adoption of this report for further action.

Sign Date.....

HON. ABDULLSWAMAD SHARIFF NASSIR, MP - CHAIRPERSON

6.0 ANNEXURES

Annex No	Title
Annex 1	Adoption list
Annex 2	Committee Minutes
Annex 3	Special Audit Report of the Auditor General on the Procurement of Pre-Export Inspection Services -Used Motor Vehicles, Mobile Equipment and Spare Parts
Annex 4	Attorney- General's letter to the Committee Ref: Ref: AG/CONF/2/C/78 VOL.1 (75) dated 28 th April 2020 the AG's Letter to KEBS Ref: AG/CONF/2/C/78 VOL.1 (75) and dated 26 th March 2020
Annex 5	PPRA's letter to the Committee dated 30 th April 2020 and PPRA's letter to KEBS Ref: PPRA/CIED/4/30/65 VOL.IV (65) dated 21 st April 2020
Annex 6	Bundle of documents tabled by Dr. Isaac Kalua alleging OAG's conflict of Interest
Annex 7	Bundle of documents presented by OAG responding to Dr. Isaac Kalua allegations
Annex 8	Legal Opinions by Iseme, Kamau & Maema Advocates Ref: STA-005-0184 dated 20 th June 2017 and Ref: KEN-013-003 dated 19 th February 2020
Annex 9	Committee letters Inviting Mr. Bernard Njiraini to Committee meetings

