REPUBLIC OF KENYA

THE SENATE

Approved
8/9/2020

TWELFTH PARLIAMENT— FOURTH SESSION

REPORT OF THE INVESTIGATION OF THE MANAGED EQUIPMENT SERVICES

BY THE

AD-HOC COMMITTEE TO INVESTIGATE THE MANAGED EQUIPMENT SERVICES

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

8TH SEPTEMBER, 2020

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PREFACE

Mr. Speaker Sir,

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

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

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

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

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

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

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

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

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

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

Mr. Speaker Sir,

The following Senators were appointed to serve in the Committee —

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

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

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

Mr. Speaker Sir,

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

Mr. Speaker Sir,

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

Mr. Speaker Sir,

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

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

Mr. Speaker.

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

SIGNED .....

8TH SEPTEMBER, 2020

SEN. DULLO FATUMA ADAN, CBS, M.P.

CHAIRPERSON, *AD-HOC* COMMITTEE TO INVESTIGATE THE MANAGED EQUIPMENT SERVICES

LIST OF ABBREVIATIONS AND ACRONYMS

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

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

EXECUTIVE SUMMARY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAPTER ONE
INTRODUCTION

1.1 Establishment of the *Ad-Hoc* Committee

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

The Committee was specifically mandated to investigate and establish—

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

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

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

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

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

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

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

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

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

1.2 Background to the Medical Equipment Services (MES) Project

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

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

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

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

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

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

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

1.2.1 Intergovernmental Arrangements Pertaining to the MES Project

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

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

1.2.2. Understanding the Managed Equipment Services Project

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

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

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

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

1.2.3. Objectives of the MES Project

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

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

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

1.2.4. Needs Assessment

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

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

Table 1: prioritized equipment following needs assessment

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

1.2.5. Tendering Process

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

1.2.6. Evaluation of Tenders

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

1.2.7. Award of Contracts

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

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

1.2.8. MES Service Providers

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

(a) Shenzhen Mindray Biomedical Electronics Co. (China) and subcontractor, Megascope Healthcare Limited (Kenya) for Lot 1;
(b) Esteem Industries Inc. (India) and subcontractor, Debra Limited (Kenya) for Lot 2;
(c) Bellco SRL(Italy) and subcontractor, Angelica Medical Supplies Ltd for Lot 5;
(d) Philips Medical Systems Nederland BV and sub-contractor, Philips East Africa Ltd for Lot 6; and
(e) GE East Africa Services Ltd for Lot 7.

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

1.2.9. Scope of Services

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

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

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

1.2.10 Financing

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

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

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

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

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

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

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

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

1.2.11. Healthcare Information Technology Contract

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

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

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

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

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

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

1.3. Investigations by the *Ad- Hoc* Committee

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

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

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

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

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

CHAPTER TWO

SUBMISSIONS AND EVIDENCE MADE TO THE COMMITTEE

2.1 BACKGROUND

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

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

2.2. STATE DEPARTMENTS AND AGENCIES

2.2.1. Office of the Auditor-General (OAG)

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

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

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

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

(ii) Legal Framework Governing the MES Project

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

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

(iii) Project Identification and Planning

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

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

(iii) Financing

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

Table 2

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

(iv) Procurement of Financial and Legal Advisers

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

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

(v) Pricing

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

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

(vi) Procurement of MES Equipment

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

Table III: summary of the successful bidders

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

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

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

Table iv: Payment to Bidders during special audit

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

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

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

(vii) Challenges

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

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

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

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

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

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

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

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

2.2.2.1 Committee Observations

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

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

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

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

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

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

Recommendations

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

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

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

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

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

2. Procurement of Financial and Legal Services Expert:

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

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

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

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

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

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

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

In the circumstances, the Committee finds that—

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

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

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

Recommendations

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

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

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

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

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

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

The Committee makes the following findings;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.2.2.2 Committee Recommendations

The Committee recommends that—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee Recommendations

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

2.2.2. Office of the Controller of Budget

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

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

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

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

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

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

(b) the National Government Appropriations Act; and

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

(c) Budget Allocations and Expenditure on the MES Project

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

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

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

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

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

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

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

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

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

Committee Observations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee Recommendation

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

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

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

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

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

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

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

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

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

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

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

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

Committee Recommendations

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

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

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

2.2.3. Council of Governors

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

(a) Conceptualization of the Project

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

(b) Needs Assessment

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

(c) Memoranda of Understanding (MOU)

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

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

(d) Contractual Agreement and Variations

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

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

(e) Duplication of Equipment

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

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

(f) Financing Procedures

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

(g) Schedule of Equipment

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

(h) Delivery, Installment and Commissioning of MES Equipment

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

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

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

(i) Functionality Status of MES Equipment

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

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

(j) Specialized Personnel

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

(k) Staff Training

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

(l) Consumables and Reagents

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

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

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

(m) Cost

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

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

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

Committee Observations from Meeting with the Council of Governors

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee Recommendations

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

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

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

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

2.2.4. Ministry of Health (MoH)

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

2.2.4.1 Goals and Objectives of the MES Project

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

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

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

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

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

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

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

2.2.4.3 Needs Assessment

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

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

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

2.2.4.4 Procurement

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

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

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

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

2.2.4.5 Leasing vs Outright Purchase

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

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

2.2.4.6 Cost of MES Equipment

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

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

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

2.2.4.7 Schedule of Equipment Received

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

2.2.4.8 Delivery, Installation and Commissioning of MES Equipment

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

2.2.4.9 Functionality Status of MES Equipment

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

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

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

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

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

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

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

2.2.4.10 Total Costs Incurred

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

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

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

2.2.4.11 Variation of Contract

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

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

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

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

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

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

No.	Item	Annual Amount (Kshs)
1.	Initial Contract Annual Payment for 98 hospitals	6,301,882,830.00
2.	HCIT Contract	970,381,692.00
3.	Annual Payment due to expansion of 21 additional hospitals	740,161,682.60
4.	Procurement of Laboratory Equipment	1,089,025,073.00
5.	PKF, M&E, Mid-Term Review and Administration	298,548,722.90
	Grand Total: 9,400,000,000.00	

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

2.2.4.12 Allocations in CARA to date

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

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

Total allocations in CARA across the 47 counties amounted to:

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

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

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

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

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

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

2.2.4.14 Training

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

2.2.4.15 Monitoring and Evaluation

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

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

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

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

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

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

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

2.2.4.17 Impact of MES

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

No.	MES Equipment	Impact on Health Service Delivery

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

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

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

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

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

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

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

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

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

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

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

(i) Background

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

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

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

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

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

(iii)Senate Resolution

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

(iv) 2013-2014 Health Performance Report

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

(v) Needs Assessment

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

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

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

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

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

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

(vi) Conceptualization of the MES Project

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

(vii) MES Model vs Outright Purchase and Equipment Leasing

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

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

(viii) Value for Money

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

(ix) Involvement of the Office of the Attorney General

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

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

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

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

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

(xi) Level of Preparedness of Counties

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

(i) Execution of Memoranda of Understanding

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

(xii) Basis for Charges Levied Against Counties

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

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

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

(xiv) 2.23.15 Consumables and Reagents

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

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

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

(xvi) Queries on the Procurement of MES Consultants

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

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

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

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

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

(xviii) HCIT Project

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

(xix) Costing of MES Equipment

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

2.2.4.19.1.1 Committee Observations

The Committee made the following observations:

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

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

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

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

i) Conceptualisation and Initiation of the MES Project

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

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

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

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

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

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

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

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

ii) Feasibility Study

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

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

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

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

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

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

iv) Needs Assessment

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

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

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

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

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

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

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

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

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

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

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

v) Consultation and Cooperation with County Governments

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

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

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

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

vii) Memoranda of Understanding

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

vii) Non-Adherence to Mandatory Tender Requirements

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

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

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

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

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

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

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

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

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

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

ix) Engagement of IKM Advocates as the Legal Transaction Advisors

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

x) Execution of the MES Contracts

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

xi) Execution of Additional Contracts Ancillary to the MES Contracts

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

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

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

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

xi) Issuance of GoK Letters of Support

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

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

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

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

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

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

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

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

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

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

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

xiii) Value for Money

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

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

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

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

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

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

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

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

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

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

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

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

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

xiv) County vs National Funds?

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

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

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

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

(i) Background

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

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

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

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

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

(iii)Lack of Documentation and Support from the MoH

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

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

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

(v) Variation of the MES Contracts

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

(vi) The HCIT Contract

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

(vii) Regulation of MES Equipment

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

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

(viii) Functionality of MES Equipment

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

(ix) Challenges

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

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

The Committee made the following observations:

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

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

i) Non-Adherence to Mandatory Tender Requirements

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

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

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

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

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

ii) Variation of the MES Contracts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) Background

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

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

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

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

(iii)Tenure of Office as PS, Health

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

(iv) Conceptualisation of the MES Project

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

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

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

(v) County Involvement

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