

COS

recommended
for approval for
tabling.

for approval for
tabling.

DC

Submitted for
approval for tabling

08/05/2024



| | |
|--------------------|---------------------|
| DATE | 9/5/2024 |
| TABLED BY | Sen. Marjory Chesep |
| COMMITTEE | Health |
| CLERK AT THE TABLE | |

(Vice-Chair)
Rt. Hon. Speaker
You may approve for tabling:
J.M. Nyegenye, C.B.S.,
Clerk of the senate/secretary, PSC
Date: 08/05/24

THIRTEENTH PARLIAMENT
THE SENATE

THE STANDING COMMITTEE ON HEALTH

REPORT ON THE INQUIRY INTO ALLEGED IRREGULARITIES IN THE
PROCUREMENT OF LONG-LASTING INSECTICIDE TREATED NETS AT
THE KENYA MEDICAL SUPPLIES AUTHORITY

08/05/24

Vol 1
Report +
Annexes
1-12

APPROVED
RT. HON. SEN
AMSON J. KINGI

Clerks Chambers,
Parliament Buildings,
NAIROBI

MAY, 2024

Table of Contents

| | |
|---|-----------|
| LIST OF ABBREVIATIONS..... | 3 |
| LIST OF ANNEXURES..... | 4 |
| PRELIMINARIES..... | 6 |
| A. Establishment and Mandate of the Committee..... | 6 |
| B. Functions of the Committee..... | 6 |
| C. Government Agencies and Departments..... | 6 |
| D. Committee Membership..... | 6 |
| E. Committee Secretariat..... | 8 |
| CHAIRPERSON'S FOREWORD..... | 9 |
| ADOPTION OF THE REPORT OF THE STANDING COMMITTEE ON HEALTH OF THE SENATE..... | 15 |
| CHAPTER ONE..... | 16 |
| INTRODUCTION..... | 16 |
| A. Background..... | 16 |
| B. Inquiry of the Standing Committee on Health on the allegations of irregularities in the procurement of long-lasting insecticidal nets by KEMSA..... | 17 |
| CHAPTER TWO..... | 19 |
| CONSTITUTIONAL, LEGAL AND REGULATORY CONSIDERATIONS..... | 19 |
| A. The Global Fund Legal Framework..... | 19 |
| B. Procurement Law in Kenya..... | 19 |
| (a) The Constitution of Kenya..... | 19 |
| (b) Kenya Medical Supplies Authority Act..... | 20 |
| (c) Public Finance Management Act..... | 20 |
| (d) The Public Procurement and Asset Disposal Act..... | 20 |
| (e) The Public Procurement and Asset Disposal Regulations..... | 28 |
| CHAPTER THREE..... | 32 |
| COMMITTEE PROCEEDINGS..... | 32 |
| A. Submissions by Dr. Josephine Mburu, immediate former Principal Secretary, State Department of Public Health and Professional Standards..... | 32 |
| B. Submissions by Hon. Daniel Rono, immediate former Chairperson, Board of KEMSA..... | 33 |
| C. Submissions by Ms. Terry Ramadhani, immediate former CEO, KEMSA..... | 34 |
| D) Submissions by Hon. (Eng.) Peter Tum, CGW, Principal Secretary, State Department of Sports and immediate former Principal Secretary, State Department of Medical Services, Ministry of Health..... | 38 |
| E) Submissions by Dr. Andrew Mulwa, Ag. CEO, KEMSA and immediate former Ag. DMS, Preventive and Promotive Health, MOH..... | 40 |
| F) Submissions by Dr. Nazlin Ganatarra, Head, National Strategic Public Health Programs, MOH..... | 41 |

| | |
|---|-----------|
| G) Submissions by Dr. Ahmeddin Omar, immediate former Head, Malaria Control Program, MOH..... | 42 |
| H) Submissions by Ms. Mary Muthoni, HSC, Principal Secretary, State Department of Public Health and Professional Standards..... | 43 |
| I) Submissions by the Director-General, Public Procurement Regulatory Authority. 44 | |
| J) Submissions by the Global Fund Coordinator, Global Fund Coordination and Management Unit, The National Treasury..... | 58 |
| K) Submissions by the Kenya Medical Supplies Authority (KEMSA)..... | 61 |
| L) Submissions by the Global Fund Local Agent (PwC)..... | 64 |
| M) Submissions by the Principal Secretary, The National Treasury..... | 72 |
| N) Submissions by the Cabinet Secretary, Ministry of Health..... | 78 |
| CHAPTER FIVE..... | 81 |
| COMMITTEE OBSERVATIONS..... | 81 |
| CHAPTER SIX..... | 90 |
| COMMITTEE RECOMMENDATIONS..... | 90 |

LIST OF ABBREVIATIONS

| | | |
|---------------|---|---|
| AIDS | - | Acquired Immunodeficiency Syndrome |
| CEO | - | Chief Executive Officer |
| DNMCP | - | Division of the National Malaria Control Program |
| GF | - | Global Fund |
| GFLA | - | Global Fund Local Agent |
| HSWG | - | Health Sector Working Group |
| KEMSA | - | Kenya Medical Supplies Authority |
| LLINs | - | Long-lasting insecticide nets |
| MOH | - | Ministry of Health |
| NASCOP | - | National Aids & STIs Control Program |
| PBO | - | Pyrethrin-Piperonyl Butoxide |
| PCPB | - | Pest Control Products Board |
| PFM | - | Public Finance Management Act |
| PPADA | - | Public Procurement and Asset Disposal Act |
| PPM | - | Pooled Procurement Mechanism |
| PPRA | - | Public Procurement Regulatory Authority |
| PR | - | Principal Recipient |
| PwC | - | PricewaterhouseCoopers |
| SR | - | Sub-Recipient |
| TB | - | Tuberculosis |
| TEC | - | Technical Evaluation Committee |
| TNT | - | The National Treasury |
| WHO | - | World Health Organisation |
| WHOPES | - | World Health Organization Pesticide Evaluation Scheme |

LIST OF ANNEXURES

1. *Annex 1:* Minutes.
2. *Annex 2:* Copy of the press release dated 15th May, 2023, by Hon. Felix Koskei, EGH, Chief of Staff and Head of Public Service.
3. *Annex 3:* Schedule of Committee sittings.
4. *Annex 4:* Copy of a letter, Ref. MOH/ADM/1/1/2, dated 21st February, 2023, from MoH to KEMSA regarding an alleged inconsistency in the tender specifications for the LLINs.
5. *Annex 5:* Submissions by Dr. Josephine Mburu, immediate former Principal Secretary, State Department of Public Health and Professional Standards.
6. *Annex 6:* Submissions by Ms. Terry Ramadhani, immediate former CEO, KEMSA.
7. *Annex 7:* Submissions by Hon. (Eng.) Peter Tum, OGW, Principal Secretary, State Department of Sports and immediate former Principal Secretary, State Department of Medical Services, Ministry of Health.
8. *Annex 8:* Submissions by Dr. Andrew Mulwa, Ag. CEO, KEMSA and immediate former Ag. DMS, Preventive and Promotive Health, MOH.
9. *Annex 9:* Submissions by Dr. Nazlin Ganatarra, Head, National Strategic Public Health Programs, MOH.
10. *Annex 10:* Submissions by Dr. Ahmeddin Omar, immediate former Head, Malaria Control Program, MOH.
11. *Annex 11:* Submissions by Ms. Mary Muthoni, HSC, Principal Secretary, State Department of Public Health and Professional Standards.
12. *Annex 12:* Submissions by the Director-General, Public Procurement Regulatory Authority.
13. *Annex 13:* Submissions by the Global Fund Coordinator, Global Fund Coordination and Management Unit, The National Treasury.
14. *Annex 14:* Submissions by Kenya Medical Supplies Authority (KEMSA).
15. *Annex 15:* Submissions by the Global Fund Local Agent (PwC).
16. *Annex 16:* Submissions by the Principal Secretary, The National Treasury.
17. *Annex 17:* Submissions by the Cabinet Secretary, Ministry of Health.
18. *Annex 18:* Copy of the Global Fund Grant Confirmation

19. **Annex 19:** Copy of the Memorandum of Understanding (MOU) between the National Treasury and Planning and the Kenya Medical Supplies Authority (KEMSA).
20. **Annex 20:** Guide to Global Fund Policies on Procurement and Supply Management of Health Products.
21. **Annex 21:** Ministry of Health specifications for LLIN products in Kenya.
22. **Annex 22:** Global Fund List of Insecticide Treated Nets (ITNs) that meet GF requirements for use against the malaria vector.
23. **Annex 23:** Tender Advertisement
24. **Annex 24:** Copy of memo by then Ag. Head, Division of National Malaria Program querying the omission of the PBO technical specification.
25. **Annex 25:** Copy of a letter, KEMSA/GF - PROC/23 (24), dated 22nd February, 2023, from then CEO, KEMSA, to the GF Coordinator, National Treasury, regarding the extension of the tender.
26. **Annex 26:** Advertisements for the tender extension
27. **Annex 27:** Copy of internal KEMSA communication on the tender extension.
28. **Annex 28:** Copy of memo by then Ag. Head, Division of National Malaria Program, to then Ag. Director Medical Services/Preventive and Promotive Health, affirming the specifications of the LLINs as tendered.
29. **Annex 29:** Copy of email communications between GF and MOH and KEMSA staff.
30. **Annex 30:** Minutes of the meeting between then PS, State Department of Public Health and Professional Standards and GF representatives held on 5th April, 2023.

PRELIMINARIES

A. Establishment and Mandate of the Committee

The Standing Committee on Health is established pursuant to Standing Order 228(3) of the Senate Standing Orders and is mandated to consider all matters relating to medical services, public health, and sanitation

B. Functions of the Committee

Pursuant to Standing Order 228(3), the Committee functions to –

- a) Investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration and operations of its assigned ministries and departments;
- b) Study the programme and policy objectives of its assigned ministries and departments, and the effectiveness of the implementation thereof;
- c) Study and review all legislation referred to it;
- d) Study, assess and analyze the success of the ministries and departments assigned to it as measured by the results obtained as compared with their stated objectives;
- e) Consider the Budget Policy Statement in line with Committee's mandate;
- f) Report on all appointments where the Constitution or requires the Senate to approve;
- g) Make reports and recommendations to the Senate as often as possible, including recommendations of proposed legislation;
- h) Consider reports of Commissions and Independent Offices submitted to the Senate pursuant to the provisions of Article 254 of the Constitution;
- i) Examine any statements raised by Senators on a matter within its mandate; and
- j) Follow up and report on the status of implementation of resolution within their mandate.

C. Government Agencies and Departments

In exercising its mandate, the Committee oversees the County Governments, the Ministry of Health and its various Semi-Autonomous Government Agencies (SAGAs).

D. Committee Membership

The Standing Committee on Health was constituted by the House on 27th October, 2022, and comprises of the following Members -

Chairperson

Sen. Jackson Kiplagat Mandago, EGH, MP
Senator, Uasin Gishu County

Vice-Chairperson

Sen. Mariam Sheikh Omar, MP
Specially-Elected Senator - Women

Sen. Erick Okong'o Mogeni, SC, MP,
Senator, Nyamira County.

Sen. Ledama Olekina, MP,
Senator, Narok County.

Sen. Abdul Mohammed Haji, MP
Senator, Garissa County.

Sen. Joseph Nyutu Ngugi, MP
Murang'a County.

Sen. Raphael Chimera Mwinzagu, MP,
Specially-Elected Senator - Youth

Sen. Hamida Kibwana, MP,
Specially-Elected Senator - Women

Sen. Esther Anyieni Okenyuri, MP,
Specially-Elected Senator - Women

E. Committee Secretariat

The Committee Secretariat comprises the following staff -

- | | | |
|----------------------------|---|-----------------------------------|
| 1. Ms. Mary Chesire | - | Director, Socio-Economic Services |
| 2. Mr. Boniface Lenairoshi | - | Deputy Director |
| 3. Mr. Stephen Gikonyo | - | Principal Clerk |
| 4. Dr. Christine Sagini | - | Lead Committee Clerk |
| 5. Ms. Florence Waweru | - | Committee Clerk Assistant |
| 6. Mr. Mitchelle Otoro | - | Legal Counsel |
| 7. Ms. Lilian Onyari | - | Fiscal Analyst |
| 8. Mr. Dennis Amunavi | - | Research Officer |
| 9. Mr. Victor Kimani | - | Audio Officer |
| 10. Ms. Hawa Abdi | - | Sergeant-at-Arms |
| 11. Mr. David Muthuri | - | Intern |

CHAIRPERSON'S FOREWORD

On 15th May, 2023, Hon. Felix Koskei, Chief of Staff and Head of the Public Service, released a press statement regarding alleged impropriety at the Kenya Medical Supplies Authority (KEMSA) in the management and administration of various medical programs being undertaken by Kenya in conjunction with development partners.

In the statement, the Head of Public Service noted that a regular verification exercise by Global Fund had revealed alleged maladministration on the part of KEMSA with regards to the procurement of treated mosquito nets for vulnerable households.

In line with the Government's commitment to promote accountability and openness in the management of public affairs, the statement went further to announce the termination of then Principal Secretary, State Department for Public Health and Professional Standards, Ministry of Health; the revocation and consequent reconstitution of the KEMSA Board; the suspension of the then Chief Executive Officer (CEO), KEMSA, and consequent appointment of an Ag. CEO; and, the suspension of various staff at the agency.

A. Committee Investigation

Standing order 228(3) of the Senate Standing Orders mandates the Committee to *investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration and operations of its assigned ministries and departments.*

Accordingly, at its sitting held on Thursday, 25th May, 2023, the Committee deliberated on allegations of irregularities in the procurement of long-lasting insecticidal nets (LLINs) at the Kenya Medical Supplies Authority (KEMSA) and resolved to open an inquiry into the matter.

In its deliberations, the Committee noted that the key issues for determination centered around the following-

1. The specific allegations of irregularities in the procurement of LLINs;
2. Clarity on the circumstances that led to the cancellation of the tender to procure the LLINs;
3. Clarity on what reservations Global Fund had with regards to the tender;
4. Clarity on the specific timelines for the procurement of the LLINs as agreed between Global Fund and KEMSA;
5. Clarity on allegations of undue interference on the operations of KEMSA by the line ministry; and
6. Clarity on the circumstances that led to the termination/suspension of MOH and KEMSA officials.

B. Committee Proceedings

At sittings held on diverse dates, the Committee invited current and former officials from key institutions relevant to the inquiry to make submissions, including, the Ministry of Health, the Ministry of Planning and National Treasury, KEMSA, the Public Procurement Regulatory Authority (PPRA) and PricewaterhouseCoopers, the Global Fund Local Agent.

Further to the above, the Committee reviewed technical, non-partisan output from the Parliamentary Budget Office, the Senate Directorate of Legal Services and the Senate Research Services.

The aforementioned Committee proceedings were aimed at investigating the irregularities in procurement of insecticidal treated nets, as well as understanding the broader legal, policy, regulatory and structural factors that may have contributed to the cancellation of the tender.

C. Committee Observations

Key observations made by the Committee during the course of its inquiry included (but are not limited to) -

1. The existence of a legal lacuna in the Public Procurement and Asset Disposal Act for public procurement processes involving external funding parties that require adherence to policies and guidelines that are distinct from Kenya's national procurement laws.
2. The tender specifications issued by the Ministry of Health, which was the user department, for the procurement of the nets, included the requirement of both WHOPES and "Synergist Piperonyl Butoxide (PBO) LLINs – Combination nets". The Committee did not find evidence to suggest that the Ministry was involved in the final decision by the Global Fund to advertise for the WHOPES pyrethroid LLINs.
3. A clarification sought by Dr. Josephine Mburu, former Principal Secretary, State Department of Public Health and Professional Standards, on the tender specifications ultimately led to the extension of the tender. However, the extension of the tender did not have any material impact as the tendering process proceeded regardless.
4. Nonetheless, the Committee observed that the process leading up to the extension of the tender was suspect based on a mischievous sequence of events, and the improper use of communication channels: For example, the Committee found that despite the tender being advertised on 31st January, 2023, the first query relating to the tender specifications was issued on 20th February, 2023, by the Ag. Head of the Division of the National Malaria Program, just two days to the tender opening which was scheduled for 23rd February, 2023. Further, there was no evidence to suggest that the memo followed the correct government protocols before landing on the former PS' desk.

5. With regards to the tender evaluation by KEMSA, the Committee observed that both PPRA and Global Fund established inconsistencies with the process. The Committee further noted that the PPRA audit team had established that the tender evaluation committee at KEMSA had failed to evaluate the tender in compliance with the provisions of Section 80(2) of the Public Procurement and Asset Disposal Act.
6. The above notwithstanding, the Committee observed that there were serious breaches in protocol with regards to how feedback on the tender evaluation was communicated both within the Government, and between the different agencies and GF itself: For instance, the Committee found that the KEMSA Evaluation Report was sent directly to the Global Fund by an officer, bypassing established government communication channels.

Further, the Global Fund's Pre-Award Review findings and subsequent decision to cancel the tender in favor of its agency, *wambo.org* were communicated to KEMSA during an April 2023 visit. This communication occurred without prior notice, during what was described as a routine visit, where the Global Fund informed the KEMSA Board and management of its decision.

7. With regards to the cancellation of the tender, the Committee observed that following the termination of the tender, while there was no apparent loss of public funds, KEMSA lost USD 455,589.04 (approximately Kshs. 70 million) in procurement fees.
8. Further, the Committee observed that the cancellation of the tender appeared to have been influenced by Global Fund's apparent effort to exert significant control over the procurement process from beginning to end. This included the GF team based in Geneva, Switzerland, making multiple trips to Nairobi, Kenya, at least three times during the relevant period, raising concerns about the autonomy and the ability of local government agencies to make independent decisions.
9. The Committee observed that two manufacturers were awarded the contract to supply the polyethylene and polyester nets to Kenya under the Global Fund Pooled Procurement Mechanism (*wambo.org*): That is, A to Z Textiles Mills Ltd and Tianjin Yorkool International Trading Co. Ltd.

Of significance, the two manufacturers were part of the initial 17 bidders who failed to go through in the initial tender by KEMSA (Tender No. GF ATM MAL NFM-2022/2023 OIT-02) for the supply of the LLINS.

10. With regards to the structure and organization of Global Fund operations in Kenya, it was the considered opinion of the Committee that the Ministry of Health (MoH) appeared to have been reduced to a mere bystander in the implementation of the program, with the National Treasury (TNT) as the Principal Recipient taking center stage: As structured, Members noted that officers attached to the Global Fund Management Unit (GFMU) at the National Treasury appeared to have precedence over even the Cabinet Secretary and the Principal Secretary of the MoH in programs relating to Global Fund.
11. In relation to the above, the Committee noted with concern, evidence to suggest that the program was creating impunity and weakening governance and

institutional structures in the country: For instance, Members noted that with regards to the LLINs grant, Global Fund engaged directly with MoH program and technical officers without reference to the existing line structures, including the offices of the Cabinet Secretary and the Principal Secretary.

12. Members also noted with concern, the apparent lack of communication protocol and guidelines between the GF team, and officers at the TNT and the MoH, and further took note of the use of personal emails in most communications.

13. In relation to the above, the Committee noted that the Funds' mode of communication and convoluted reporting structure had led to miscommunication, confusion and the creation of silos at strategic public health programs like malaria control.

14. Members also noted with concern, the apparent lack of communication protocol and guidelines between the GF team, and officers at the TNT and the MoH, and further took note of the use of personal emails in most communications.

As a consequence, the Committee noted that the Funds' mode of communication and convoluted reporting structure had led to miscommunication, confusion and the creation of silos at strategic public health programs like malaria control.

15. Noting that the cancellation of the tender by GF had serious implications on the reputation and image of Kenya abroad, the Committee observed the need for clear processes and procedures for the termination of donor-funded projects in alignment with Kenya's public procurement laws. Defining these protocols was necessary to safeguard against reputational risks to the country, and to ensure mutual respect, transparency and accountability in projects by donors.

16. The Committee observed that key challenges that had contributed to the governance concerns that arose in relation to the tender were related to the lack of substantive holders of office in the National Malaria Program at the MoH, and the frequent redeployment of officers.

17. And further, that many local suppliers were constructively shut out of the tender owing to the imposition of tender specifications that favored international suppliers i.e. WHOPES recommendation.

D. Committee Recommendations

Based on the foregoing, the Committee recommends -

1. The Senate to amend the Public Procurement and Asset Disposal Act to clarify processes involving third party entities and donors in public procurement.
2. The automatic disqualification of any company that fails a national tender evaluation process in a donor-funded program from further consideration by the donor to minimize potential abuse and/or collusion.

3. Implementation of measures to prioritize locally manufactured goods in both public and donor-driven procurements where applicable.
4. The immediate redeployment of all officers in the National Malaria Control Program at the Ministry of Health, and the application of necessary administrative/disciplinary processes of the said officers where applicable.
5. In line with section 34(3) of the Public Service Act, 2017, which states that public officers can only serve in acting capacity for one (1) month and up to a maximum of six (6) months, the Ministry of Health in collaboration with the Public Service Commission (PSC) act to competitively fill all vacant positions within its approved structure within a period of 12 months.
6. A review of the structural relationship between the Government of Kenya and the Global Fund to prioritize user departments, in this case, the Ministry of Health, as the principal rather than subsidiary recipient in programs related to their mandate.
7. The disbandment of the Global Fund Management Unit at the National Treasury, and the full transfer of its responsibilities and functions to the Ministry of Health.
8. The establishment of a standing committee within the Ministry of Health to periodically review and publish standards and specifications for health products and technologies in the country.
9. The issuance of communication protocols and guidelines by the Head of Public Service for adherence across government agencies.
10. The Ministry of ICT act to ensure that all government communication is relayed through official communication channels.
11. The automation of all procurement processes at KEMSA to increase efficiencies, and minimize human error.
12. The application by the Ministry of Health to the National Treasury for KEMSA to receive its own direct Vote Head for operational autonomy.

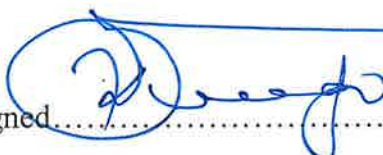
A comprehensive summary of the Committee's findings, observations and recommendations in relation to the inquiry has been included in the body of the report for reference.

Acknowledgements

On behalf of the Committee, I wish to thank the various stakeholders who came before the Committee and submitted their views, including: the Cabinet Secretary, Ministry of Health; the Principal Secretary, National Treasury; officers attached to the Global Fund Management Unit at the National Treasury; the current and former board and management of KEMSA; the Director-General, PPRA; PricewaterhouseCoopers and the Global Fund Local Agent.

I also wish to thank the Offices of the Speaker and Clerk of the Senate for their support during the entire process of considering this matter.

It is now my pleasant duty and privilege to present this report of the Standing Committee on Health, for consideration and approval by the House pursuant to Standing Order No. 213 (6) of the Senate Standing Orders.




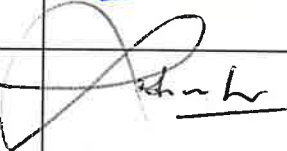


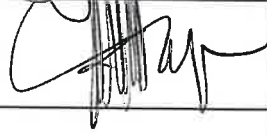


Signed.......... Date.....21/05/2024.....

SEN. JACKSON KIPLAGAT MANDAGO, EGH, MP

CHAIRPERSON, STANDING COMMITTEE ON HEALTH

**ADOPTION OF THE REPORT OF THE SENATE STANDING COMMITTEE
ON HEALTH ON THE INQUIRY INTO ALLEGED IRREGULARITIES IN
THE PROCUREMENT OF LONG-LASTING INSECTICIDE TREATED NETS
AT THE KENYA MEDICAL SUPPLIES AUTHORITY**

**We, the undersigned Members of the Senate Standing Committee on Health, do
hereby append our signatures to adopt the Report-**

| | Name | Designation | Signature |
|----|--|------------------|---|
| 1. | Sen. Jackson Kiplagat Mandago, EGH, MP | Chairperson |  |
| 2. | Sen. Mariam Sheikh Omar, MP | Vice-Chairperson |  |
| 3. | Sen. Erick Okong'o Mogeni, SC, MP | Member |  |
| 4. | Sen. Ledama Ole kina, MP | Member |  |
| 5. | Sen. Raphael Chimera Mwinzagu, MP | Member |  |
| 6. | Sen. Joe Nyutu Ngugi, MP | Member |  |
| 7. | Sen. Abdul Mohammed Haji, MP | Member |  |
| 8. | Sen. Hamida Kibwana, MP | Member |  |
| 9. | Sen. Esther Anyieni Okenyuri, MP | Member |  |

CHAPTER ONE

INTRODUCTION

A. Background

- 1) On 15th May, 2023, Hon. Felix Koskei, EGH, Chief of Staff and Head of the Public Service, released a statement regarding alleged impropriety at the Kenya Medical Supplies Authority (KEMSA) in the management and administration of various medical programmes being undertaken by Kenya in conjunction with development partners.
- 2) In the statement, the Head of Public Service noted that a regular verification exercise by Global Fund had revealed alleged maladministration on the part of KEMSA with regards to the procurement of treated mosquito nets for vulnerable households.
- 3) In affirmation of the Government's commitment to promote accountability and openness in the management of public affairs, the statement notified members of the public that H. E. the President had –
 - a) Terminated the appointment of Dr. Josephine Mburu, PhD, as the Principal Secretary, State Department for Public Health and Professional Standards;
 - b) Revoked the appointments of the Chairperson and Members of the Board of Directors of KEMSA; and
 - c) Appointed Mr. Irungu Nyakera as the Chairperson of the Board in accordance with the procedure set out under section 5(1) of the KEMSA Act.
- 4) The statement further acknowledged that the Cabinet Secretary for Health had undertaken the following remedial actions –
 - a) Reconstituted the Board of KEMSA by appointing the following persons as members: FCPA Hezbon Oyieko Omollo, Mr. Bernard Kipkirui Bett, Dr. Jane Masiga and Ms. Jane Nyagaturi Mbatia;
 - b) Suspended Ms. Terry Ramadhani, then Chief Executive Officer of KEMSA, alongside other concerned staff serving within the National Malaria Program in the Ministry of Health and KEMSA, namely: Martin Wamwea (MoH), Lenson Kariuki (MoH), Dr. Pauline Duya (MoH), Livingstone Njuguna (MoH), Dr. Charles Kariuki Chege (MoH), Justus Kinoti (KEMSA) and Anthony Chege (KEMSA);
 - c) Appointed Dr. Andrew Mutava Mulwa as the Acting Chief Executive Officer of KEMSA; and

- d) Directed the new management to assure propriety of procurement processes within the Authority.

A copy of the press release has been annexed to this report as *Annex 2*.

- 5) At its sitting held on Thursday, 25th May, 2023, the Committee deliberated on allegations of irregularities in the procurement of long-lasting insecticidal nets (LLINs) at the Kenya Medical Supplies Authority (KEMSA) and resolved to open an inquiry into the matter.
- 6) In conducting this inquiry, the Committee noted that the key issues for determination centered around the following-
 - a) The specific allegations of irregularities in the procurement of LLINs;
 - b) Clarity on the circumstances that led to the cancellation of the tender to procure the LLINs;
 - c) Clarity on what reservations Global Fund had with regards to the tender;
 - d) Clarity on the specific timelines for the procurement of the LLINs as agreed between Global Fund and KEMSA;
 - e) Clarity on allegations of undue interference on the operations of KEMSA by the line ministry; and
 - f) Clarity on the circumstances that led to the termination/suspension of MOH and KEMSA officials.

B. Inquiry of the Standing Committee on Health on the allegations of irregularities in the procurement of long-lasting insecticidal nets by KEMSA

- 7) Standing order 228(3) of the Senate Standing Orders mandates the Committee to *Investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration and operations of its assigned ministries and departments.*
- 8) Accordingly, at sittings held on diverse dates, the Committee resolved to invite various stakeholders to make submissions in relation to the inquiry as follows -
 - a) Ministry of Health
 - Hon. Susan Nakhumincha, Cabinet Secretary, Ministry of Health;
 - Ms. Mary Muthoni, HSC, Principal Secretary, State Department of Public Health and Professional Standards;
 - Dr. Josephine Mburu, immediate former Principal Secretary, State Department of Public Health and Professional Standards;

- Hon. (Eng.) Peter Tum, Principal Secretary, State Department of Sports and immediate former Principal Secretary, State Department of Medical Services;
- Dr. Andrew Mutava Mulwa, immediate former Director of Medical Services and Ag. Director, Directorate of Preventive and Promotive Health Services;
- Dr. Nazlin Ganatarra, Head, National Strategic Public Health Programs, Ministry of Health
- Dr. Ahmeddin Omar, immediate former Ag. Head, Division of Malaria Control;

b) The National Treasury

- Dr. Chris Kiptoo, Principal Secretary, National Treasury
- Global Fund Coordination and Management Unit

c) KEMSA

- Mr. Irungu Nyakera, Chairperson, Board of KEMSA;
- Hon. Daniel Rono, immediate former Chairperson, Board of KEMSA; and
- Ms. Terry Ramadhani, immediate former Chief Executive Officer, KEMSA.

d) The Director-General, Public Procurement Regulatory Authority

e) PrivewaterhouseCoopers, The Global Fund Local Agent.

- 9) A schedule of the Committee's meetings in relation to the same has been annexed to this report as ***Annex 3***.
- 10) Further to the above, the Committee reviewed technical, non-partisan output from the Parliamentary Budget Office, the Senate Directorate of Legal Services and the Senate Research Services.
- 11) The aforementioned Committee proceedings were aimed at investigating the irregularities in procurement of insecticidal treated nets, as well as understanding the broader legal, policy, regulatory and structural factors that may have contributed to the cancellation of the tender.

CHAPTER TWO

CONSTITUTIONAL, LEGAL AND REGULATORY CONSIDERATIONS

A. The Global Fund Legal Framework

- 12) The Global Fund to Fight AIDS, Tuberculosis and Malaria (the Global Fund) entered into an agreement (Grant Confirmation) with the National Treasury (Principal Recipient) on behalf of the Republic of Kenya (Grantee) with the objective of working towards a malaria free Kenya. The agreement was executed and became effective on 14th June, 2021.
- 13) The Grant Confirmation mandated the National Treasury to comply with the Global Fund Guidelines for Grant Budgeting (2019, as amended from time to time), the Health Products Guide (2018, as amended from time to time) and any other policies, procedures, regulations and guidelines which the Global Fund would communicate in writing to the Republic of Kenya and the National Treasury from time to time.
- 14) In this respect, the National treasury had on 22nd February, 2019 entered into a Memorandum of Understanding with the Kenya Medical Supplies Authority (KEMSA) commencing 1st September, 2017 and ending on 31st August, 2021.
- 15) Vide the Memorandum of Understanding, the National Treasury appointed the Kenya Medical Supplies Authority to perform the procurement and supply chain management services under the Global Fund to Fight AIDS, TB and Malaria funded programs in Kenya.
- 16) The Memorandum of Understanding required KEMSA to ensure that procurement and supply chain management activities under the Global Fund were conducted in conformity with the Public Procurement and Asset Disposal Act, 2015 and the Global Fund Procurement and Supply Management Guidelines as revised from time to time. The Memorandum of Understanding further provided that it would be interpreted exclusively in accordance with the laws of the Republic of Kenya.

B. Procurement Law in Kenya

(a) The Constitution of Kenya

- 17) The Constitution of Kenya, 2010 (Constitution) is the supreme law of Kenya and binds all persons.¹ Any law which is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission in contravention of the Constitution is invalid.²
- 18) Article 227 of the Constitution states as follows—

¹ Article 2 (1) of the Constitution.

² Article 2 (4) of the Constitution.

Procurement of public goods and services.

227. (1) *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.*

(2) *An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—*

- a) categories of preference in the allocation of contracts;*
- b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;*
- c) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and*
- d) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.*

(b) Kenya Medical Supplies Authority Act

19) Section 4(a) of the Kenya Medical Supplies Authority Act, 2013 states that the functions of the Kenya Medical Supplies Authority shall be to, among others, “procure, warehouse and distribute drugs and medical supplies for prescribed public health programmes, the national strategic stock reserve, prescribed essential health packages and national referral hospitals”.

(c) Public Finance Management Act

20) Section 30 of the Public Finance Management Act, 2013 states that “all procurement of goods and services required for the purposes of the national government or a national government entity is to be carried out in accordance with Article 227 of the Constitution and the relevant legislation on procurement and disposal of assets”.

(d) The Public Procurement and Asset Disposal Act

21) The Public Procurement and Asset Disposal Act, 2015 is the primary law for public procurement in Kenya. Section 5(1) of the Act states that the Act prevails in case of any inconsistency between it and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services.

- 22)Section 6(1) of the Public Procurement and Asset Disposal Act however provides that subject to the Constitution, where any provision of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified by Kenya and to which Kenya is party, the terms of the treaty or agreement shall prevail.
- 23)Section 8 of the Public Procurement and Asset Disposal Act establishes the Public Procurement Regulatory Authority to oversee public procurement and asset disposal in the country. Section 35 thereafter empowers the Authority to undertake investigations relating to a procurement or disposal proceeding or contract with respect to a procurement or disposal with respect to a State organ or public entity for the purpose of determining whether there has been a breach of the Act or its Regulations.
- 24)Section 44 of the Public Procurement and Asset Disposal Act states that *an accounting officer of a public entity shall be primarily responsible for ensuring that the public entity complies with the Act.* It further mandates the accounting officer to, among others, ensure the procurement and asset disposal process of the public entity comply with the Act.
- 25)Section 46 of the Public Procurement and Asset Disposal Act on the other hand mandates an accounting officer to ensure that an ad hoc evaluation committee is established in accordance with the Act and its Regulations from within the members of staff with the relevant expertise. It further mandates the evaluation committee to —
- a) *deal with the technical and financial aspects of a procurement as well as the negotiation of the process including evaluation of bids, proposals for prequalification, registration lists, Expression of Interest and any other roles assigned to it;*
 - b) *consist of between three and five members appointed on a rotational basis comprising heads of user department and two other departments or their representatives and where necessary, procured consultants or professionals, who shall advise on the evaluation of the tender documents and give a recommendation on the same to the committee within a reasonable time;*
 - c) *have as its secretary, the person in charge of the procurement function or an officer from the procurement function appointed, in writing, by the head of procurement function;*
 - d) *complete the procurement process for which it was appointed and no new committee shall be appointed on the same issue unless the one handling the issue has been procedurally disbanded;*
 - e) *adopt a process that shall ensure the evaluation process utilized adheres to Articles 201(d) and 227(1) of the Constitution.*

- 26) Section 49 of the Public Procurement and Asset Disposal Act states that empowers a procuring entity or procuring entities with common interest to establish a procuring agency at the national or county level for the purpose of procurement and distribution of sector-specific goods, works and services on behalf of procuring entities within the respective sector and shall be in accordance with the Act and the regulations made thereunder.
- 27) Section 52 of the Public Procurement and Asset Disposal Act states that the Public Procurement Regulatory Authority shall have power to transfer the procuring responsibility of a procuring entity to another procuring entity or procuring agent in the event of delay or in such other circumstances as may be prescribed. It further provides that subject to the approval of the governing body of the organ or entity, where applicable or upon recommendation of the Authority, an accounting officer shall make arrangements to enable another procuring entity to carry out the procurement or part of the procurement, on behalf of a procuring entity, in accordance with the Act.
- 28) Section 53 of the Public Procurement and Asset Disposal Act stipulates that all procurement by State organs and public entities are subject to the rules and principles of the Act. It further mandates accounting officers to prepare annual procurement plans which are realistic in a format set out in the Regulations within the approved budget prior to commencement of each financial year as part of the annual budget preparation process. It also prohibits accounting officers from commencing any procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in the respective approved budget estimates.
- 29) Section 53 of the Public Procurement and Asset Disposal Act further states that an accounting officer who knowingly commences any procurement process without ascertaining whether the good, work or service is budgeted for, commits an offense under the Act and that any state or public officer who fails to prepare procurement and disposal plans shall be subject to internal disciplinary action.
- 30) Section 60(1) of the Public Procurement and Asset Disposal Act mandates an accounting officer of a procuring entity to prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings. Section 60(2) thereafter stipulates that the specific requirements shall include all the procuring entity's technical requirements with respect to the goods, works or services being procured. Section 60(3) subsequently states that the technical requirements shall, where appropriate—

a) *conform to design, specification, functionality and performance;*

- b) be based on national or international standards, whichever is superior;*
- c) factor in the life of the item;*
- d) factor in the socio-economic impact of the item;*
- e) be environment-friendly;*
- f) factor in the cost disposing the item; and*
- g) factor in the cost of servicing and maintaining the item.*

31)Section 63(1) of the Public Procurement and Asset Disposal Act mandates an accounting officer of a procuring entity to, at any time prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where—

- a) the subject procurement have been overtaken by operation of law or substantial technological change;*
- b) inadequate budgetary provision;*
- c) no tender was received;*
- d) there is evidence that prices of the bids are above market prices;*
- e) material governance issues have been detected;*
- f) all evaluated tenders are non-responsive;*
- g) force majeure;*
- h) civil commotion, hostilities or an act of war; or*
- i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.*

32)Section 63(2) of the Public Procurement and Asset Disposal Act mandates an accounting officer who terminates procurement or asset disposal proceedings to give the Public Procurement Regulatory Authority a written report on the termination within fourteen days. Thereafter section 63(3) stipulates that the report shall include the reasons for the termination. Subsequently section 63(4) mandates an accounting officer to notify all persons who submitted tenders of the termination within fourteen days of termination and such notice that shall contain the reason for termination.

33)Section 65 of the Public Procurement and Asset Disposal Act on the other hand makes provision for inappropriate influence on evaluation. It states as follows—

(1) After the deadline for the submission of tenders, proposals or quotations—

- (a) a person who submitted a tender shall not make any unsolicited communications to the procuring entity or any person involved in the procurement proceedings that might reasonably be construed as an attempt to influence the evaluation and comparison of tenders; and*
- (b) a person shall not attempt, in any way, to influence that evaluation and comparison.*

(2) A person who contravenes the provisions of subsection (1) commits an offense and shall lead to the tenderer being disqualified and the public officer facing disciplinary action in addition to any other action under this Act.

(3) Upon completion of the evaluation process, a tenderer may communicate with the procuring entity on the procurement proceedings.

- 34) Section 66(1) and (2) of the Public Procurement and Asset Disposal Act makes it an offense for a person to whom the Act applies to be involved in any corrupt, coercive, obstructive, collusive or fraudulent practice; or conflicts of interest in any procurement or asset disposal proceeding.
- 35) Section 74(1)(i) of the Public Procurement and Asset Disposal Act on the other hand mandates the accounting officer to ensure that the preparation of an invitation to tender sets out the requirement of serialization of pages by the bidder for each bid submitted.
- 36) Section 75 of the Public Procurement and Asset Disposal Act empowers a procuring entity to amend tender documents at any time before the deadline for submitting tenders by issuing an addendum without materially altering the substance of the original tender. It also provides that such an amendment may be made on the procuring entity's own initiative or in response to an inquiry by a candidate or tenderer.
- 37) Section 75 of the Public Procurement and Asset Disposal Act mandates a procuring entity to promptly provide a copy of an addendum to tender documents to each person to whom the procuring entity provided copies of the tender documents and stipulates that the addendum shall be deemed to be part of the tender documents. It further stipulates that if tender documents are amended when the time remaining before the deadline for submitting tenders is less than one third of the time allowed for the preparation of tenders, or the time remaining is less than the period indicated in instructions to tenderers, the accounting officer of a procuring entity shall extend the deadline as necessary to allow the amendment of the tender documents to be taken into account in the preparation or amendment of tenders.
- 38) Section 79 of the Public Procurement and Asset Disposal Act stipulates that a tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents. It however stipulates that a responsive tender shall not be affected by minor deviations that do not materially depart from the requirements set out in the tender documents or errors or oversights that can be corrected without affecting the substance of the tender. It further states that such a minor deviation shall be quantified to the extent possible and be taken into account in the evaluation and comparison of tenders.
- 39) Section 80 of the Public Procurement and Asset Disposal Act mandates the evaluation to evaluate and compare the responsive tenders and that the

evaluation and comparison be done using the procedures and criteria set out in the tender documents. It further stipulates that the criteria shall, to the extent possible, be objective and quantifiable and that each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation. It also mandates the evaluation committee to prepare an evaluation report containing a summary of the evaluation and comparison of tenders and submit the report to the person responsible for procurement for their review and recommendation.

40) Section 84 of the Public Procurement and Asset Disposal Act on the other hand mandates the head of procurement function of a procuring entity to, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings. It also mandates the accounting officer to take into account the views of the head of procurement in the signed professional opinion when making a decision to award a tender.

41) Section 86 of the Public Procurement and Asset Disposal Act makes provision for successful tenders. It stipulates that citizen contractors, or those entities in which Kenyan citizens own at least fifty-one per cent shares, shall be entitled to twenty percent of their total score in the evaluation, provided the entities or contractors have attained the minimum technical score. It also stipulates, in no uncertain terms, that a successful tender shall be the one who meets any one of the following as specified in the tender document—

- a) the tender with the lowest evaluated price;*
- b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;*
- c) the tender with the lowest evaluated total cost of ownership; or*
- d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges.*

42) Section 87 of the Public Procurement and Asset Disposal Act on the other hand stipulates that before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

43) Section 88 of the Public Procurement and Asset Disposal Act provides that before the expiry of the period during which tenders shall remain valid, the accounting officer of a procuring entity may extend that period. It also mandates the accounting officer to give notice, in writing, of such an extension to each person who submitted a tender and further stipulates that the extension be restricted to not more than thirty days and only be done once.

44) Section 89 of the Public Procurement and Asset Disposal Act makes provision for International tendering and competition. It states that if there will not be effective competition for a procurement unless foreign tenderers participate, the following shall apply—

- a) the invitation to tender and the tender documents shall be in English;*
- b) if the procuring entity is required to advertise the invitation to tender under sections 96(2) and 118(1), the procuring entity shall also advertise the invitation to tender in Kenya's dedicated tenders portal or one or more English-language newspapers or other publications that, together, have sufficient circulation outside Kenya to allow effective competition for the procurement;*
- c) the period of time between the advertisement under paragraph (b) and the deadline for submitting tenders shall be not less than the minimum period of time prescribed for the purpose of this paragraph;*
- d) the technical requirements shall, to the extent compatible with requirements under Kenyan law, be based on international standards or standards widely used in international trade;*
- e) a tenderer submitting a tender may, in quoting prices or providing security, use a currency that is widely used in international trade and that the tender documents specifically allow to be used;*
- f) where local or citizen contractors participate they shall be entitled to preferences and reservations as set out in section 155; and*
- g) any other conditions as may be prescribed.*

45) Section 91 of the Public Procurement and Asset Disposal Act stipulates that open tendering shall be the preferred procurement method for procurement of goods, works and services but that the procuring entity may use an alternative procurement procedure only if that procedure is allowed and satisfies the conditions under the Act for use of that method. Section 96 thereafter stipulates that the accounting officer of a procuring entity shall take such steps as are reasonable to bring the invitation to tender an open tender to the attention of those who may wish to submit tenders.

- 46)Section 97 of the Public Procurement and Asset Disposal Act stipulates that the time allowed for the preparation of tenders shall not be less than the minimum period of time prescribed for the purpose. Section 98 thereafter provides that upon advertisement, the accounting officer of a procuring entity shall immediately provide copies of the tender documents in accordance with the invitation to tender and the accounting officer shall upload the tender document on the website.
- 47)Section 155 of the Public Procurement and Asset Disposal Act stipulates that pursuant to Article 227(2) of the Constitution and despite any other provision of the Act or any other legislation, all procuring entities shall comply with the provisions of preferences and reservation in procurement under the Act. It further mandates procuring entities seeking to procure items not wholly or partially manufactured in Kenya to require successful bidders to cause technological transfer or create employment opportunities as prescribed in the Regulations and that its accounting officer causes a report to be prepared detailing evidence of inability to procure manufactured articles, materials and supplies wholly mined or produced in Kenya.
- 48)Section 157 of the Public Procurement and Asset Disposal Act on the hand provides that for the purpose of ensuring sustainable promotion of local industry, a procuring entity shall have in its tender documents a mandatory requirement as preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender.
- 49)Section 176 of the Public Procurement and Asset Disposal Act prohibits any person from—
- a) *obstructing or hindering a person carrying out a duty or function or exercising a power under the Act;*
 - b) *delaying, without justifiable cause, the opening or evaluation of tenders, the awarding of contract beyond the prescribed period or payment of contractors beyond contractual period and contractual performance obligations;*
 - c) *unduly influencing or exerting pressure on any member of an opening committee evaluation committee and disposal committee or on any employee or agent of a procuring entity or the accounting officer to take a particular action which favors or tends to favor a particular tenderer;*
 - d) *inappropriately influencing tender evaluations; or*
 - e) *committing a fraudulent act.*

- 50) Section 176 of Act further states that a person who contravenes the provision above commits an offense and shall upon conviction be liable, if the person is a natural person, to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years, or to both and if the person is a body corporate, to a fine not exceeding ten million shillings. It also provides that in addition to the penalty above, a public officer involved shall be subject to internal disciplinary action.
- 51) Section 177 of the Public Procurement and Asset Disposal Act on the other hand stipulates that a person convicted of an offense under the Act for which no penalty is provided shall upon conviction be liable, if the person is a natural person, to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years or to both and if the person is a body corporate, to a fine not exceeding ten million shillings.
- 52) Section 178 of the Public Procurement and Asset Disposal Act states that a person shall not, in their personal capacity, be liable in civil or criminal proceedings in respect of any act or omissions done in good faith in the performance of their duties under the Act.

(e) The Public Procurement and Asset Disposal Regulations

- 53) The Public Procurement and Asset Disposal Regulations, 2020 are the rules governing public procurement in Kenya. Paragraph 30 of the Regulations states that in discharging the mandate provided for under the Act, members of an evaluation committee shall conduct the technical and financial evaluation of the tenders or proposals availed in strict adherence to the compliance and evaluation criteria set out in the tender documents and perform the evaluation or negotiation with due diligence.
- 54) Paragraph 32 of the Public Procurement and Asset Disposal Regulations thereafter states that the financial evaluation of the tenders or proposals received shall be in strict adherence to the compliance and evaluation criteria set out in the tender documents or request for proposals.
- 55) Paragraph 34 of the Public Procurement and Asset Disposal Regulations on the other hand stipulates that subject to the Act, a user department of a procuring entity shall be responsible for—
- a) *initiating procurement and asset disposal requirements and forward them to the head of procurement function;*
 - b) *participating in the evaluation of tenders, proposals and quotations;*
 - c) *managing, monitoring and reporting any departure from the terms and conditions of the contract to the head of procurement function;*
 - d) *preparing and submitting technical specifications for goods, works and services to the procurement function;*

- e) *preparing departmental procurement and asset disposal plans and submit to the procurement function;*
- f) *making clarifications on tenders, requests for quotations and any other matter through the head of procurement function as may be required; and*
- g) *carrying out any other functions and duties as provided for under the Public Procurement and Asset Disposal Act or Regulations.*

56) Paragraph 36(1) of the Public Procurement and Asset Disposal Regulations stipulates that where a sector-specific procuring and disposal agency is established under section 49 of the Act, a procuring entity or entities may engage the services of that agency for purposes of procurement and distribution of goods, works and services.

57) Paragraph 48 of the Public Procurement and Asset Disposal Regulations provides that prior to the cancellation or termination of a procurement and asset disposal proceeding under section 63 of the Act, an accounting officer may take into account the recommendations of the head of the procurement function.

58) Paragraph 53 of the Public Procurement and Asset Disposal Regulations on the other hand allows tenderers, suppliers and consultants to register as a single entity, joint venture or association with sub-contractors or sub-consultants in compliance with the Act through an application form provided by the system for registration.

59) Paragraph 56 of the Public Procurement and Asset Disposal Regulations thereafter states that where a candidate or tenderer makes an inquiry relating to the amended tender documents under section 75(2) of the Act, the procuring entity shall promptly respond in writing in both manual and through electronic mail where possible, and such correspondence shall be sent through the official communication address of the procuring entity. It further provides that where the response above affects the requirements of the tender, the response shall be copied to all candidates and shall include a description of the inquiry but without identifying the source.

60) Paragraph 74 of the Public Procurement and Asset Disposal Regulations mandates the evaluation committee, pursuant to section 80 of the Act and upon opening of tenders, to first conduct a preliminary evaluation to determine whether—

- a) *a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;*
- b) *the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;*
- c) *any tender security submitted is in the required form, amount and validity period, where applicable;*

- d) *the tender has been duly signed by the person lawfully authorized to do so through the power of attorney;*
- e) *the required number of copies of the tender have been submitted; the tender is valid for the period required; any required samples have been submitted; and*
- f) *all required documents and information have been submitted.*

61) Paragraph 74 of the Public Procurement and Asset Disposal Regulations further stipulates that subject to section 79(2)(b) of the Act, any errors in the submitted tender arising from a miscalculation of unit price, quantity, subtotal and total bid price shall be considered as a major deviation that affects the substance of the tender and shall lead to disqualification of the tender as non-responsive.

62) Paragraph 75 of the Public Procurement and Asset Disposal Regulations mandates procuring entities to reject all tenders, which are not in conformity to the requirements of section 79 of the Act and paragraph 74 of the Regulations. It further stipulates that the classification of a deviation from the requirements as minor under section 79(2) (a) of the Act shall be applied uniformly and consistently to all tenders received by a procuring entity.

63) Paragraph 76 of the Public Procurement and Asset Disposal Regulations mandates an evaluation committee to, upon completion of a preliminary evaluation under paragraph 74 of the Regulations, conduct a technical evaluation by comparing each tender to the technical requirements of the goods, works or services in the tender document. It thereafter mandates the evaluation committee to reject tenders which do not satisfy the technical requirements.

64) Paragraph 77 of the Public Procurement and Asset Disposal Regulations mandate the evaluation committee, upon completion of the technical evaluation under regulation 76 of the Regulations, to conduct a financial evaluation and comparison to determine the evaluated price of each tender. It also stipulates that the evaluated price for each bid shall be determined by—

- a) *taking the bid price in the tender form;*
- b) *taking into account any minor deviation from the requirements accepted by a procuring entity under section 79(2)(a) of the Act;*
- c) *where applicable, converting all tenders to the same currency, using the Central Bank of Kenya exchange rate prevailing at the tender opening date; and*
- d) *applying any margin of preference indicated in the tender document.*

65) Paragraph 78 of the Public Procurement and Asset Disposal Regulations stipulates that an evaluation report prepared under section 80(4) of the Act shall be reviewed by the head of the procurement function and forwarded to the

accounting officer together with the professional opinion referred to in section 84 of the Act within a day upon receipt of the evaluation report. It also allows the head of the procurement function to seek for clarification from the evaluation committee before making a professional opinion.

66) Paragraph 79 of the Public Procurement and Asset Disposal Regulations on the other hand mandates accounting officers, upon receipt of the evaluation report and professional opinion, to take into account the contents of the professional opinion and within a day, in writing—

- a) *approve award to the successful tenderer;*
- b) *seek clarification from the head of the procurement function or the evaluation committee prior to approving or rejecting the award; or*
- c) *reject the recommendations.*

67) Paragraph 80 of the Public Procurement and Asset Disposal Regulations provides that pursuant to section 83 of the Act, a procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the bid recommended by the evaluation committee, in order to determine whether the tenderer is qualified to be awarded the contract in accordance with sections 55 and 86 of the Act. It further provides that where an awarded bidder is determined not qualified after due diligence in accordance with the Act, the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer—

- a) *who submitted the next responsive bid for goods, works or services as recommended by the evaluation committee; or*
- b) *who emerges as the lowest evaluated bidder after re-computing financial and combined score for consultancy services under the Quality Cost Based Selection method.*

68) Paragraph 83 of the Public Procurement and Asset Disposal Regulations stipulates that where the provisions of section 89(c) of the Act apply with respect to foreign tenders, the minimum period of time between the advertisement and deadline for submission of international tenders shall be seven days.

CHAPTER THREE COMMITTEE PROCEEDINGS

- 69) In conducting the inquiry, at sittings held on diverse dates between Tuesday, 8th June, 2023, and Friday, 28th July, 2023, the Committee held meetings with the Cabinet Secretary, Ministry of Health; Principal Secretary, The National Treasury; the current and immediate former Principal Secretaries, State Department of Public Health and Professional Standards; the immediate former Principal Secretary, State Department of Medical Services; the current and immediate former Chairperson, KEMSA Board; the current and immediate former CEO, KEMSA; The Global Fund Coordinator; The Director-General, Public Procurement Regulatory Authority; the Global Fund Coordination and Management Unit at the National Treasury; and, the Global Fund Local Agent (PwC).
- 70) A schedule of the Committee's meetings in relation to the same has been annexed to this report as *Annex 3*.
- 71) The following section provides a summary of the submissions presented before the Committee by the various stakeholders.

A. Submissions by Dr. Josephine Mburu, immediate former Principal Secretary, State Department of Public Health and Professional Standards

- 72) The Committee met with Dr. Josephine Mburu, immediate former Principal Secretary, State Department of Public Health and Professional Standards, during its sittings held on Tuesday, 6th June, 2023, and Wednesday, 12th July, 2023. A summary of her testimony is provided below.
- 73) As the Principal Secretary, State Department of Public Health and Professional Standards, Ministry of Health, she was not involved in the procurement of the LLINs, as KEMSA fell under the State Department of Medical Services which was then headed by PS (Eng.) Peter Tum, OGW.
- 74) It was her testimony that she was not involved in the procurement process of the LLINs whatsoever, as the role of the Ministry of Health was limited to forecasting and quantification, and development of technical specifications.
- 75) Her letter, Ref. MOH/ADM/1/1/2, dated 21st February, 2023, to the CEO, KEMSA, informing her of an inconsistency in the tender specifications for the LLINs, and seeking clarity on the specifications under Table 7 of the tender on 'synergistic Piperonyl Butoxide (PBO)' combination nets did not elicit any response or stall the project as the procurement process proceeded regardless (*Annex 4*). She further clarified that the letter was not intended to extend the tender, but rather to seek clarification. She further testified that the PBO combination nets were superior to the pyrethroid nets, and had been in use in the country since 2016.

- 76) It was her testimony that the request for clarification on the technical specifications of the tender was given on the technical advice of Dr. Andrew Mulwa, then Ag. Director of Medical Services, and Dr. Ahmeddin Omar, Head of the Malaria Control Program during a briefing meeting. She submitted that the officers in question advised her that the tender advertisement had omitted a key component relating to PBO insecticide impregnation.
- 77) She denied any knowledge of a memo dated 28th February, 2023, generated by Dr. Ahmeddin Omar, Ag. Head Division of the National Malaria Program and addressed to Ag. Director of Medical Services, Preventive and Promotive Health, through the Head of the National Strategic Public Health Programs, which affirmed the technical specifications of the LLINs. She stated that it was never brought to her attention, nor did it trigger her above mentioned letter, Ref. MOH/ADM/1/1/2, dated 21st February, 2023, to the CEO, KEMSA.
- 78) With regards to the aforementioned letter, she iterated that Dr. Mulwa came to her office with the draft, and signed it while seated in her office, following which she signed the draft letter to the CEO, KEMSA. She was, however, unable to produce a copy of the alleged draft by Dr. Mulwa.
- 79) On her role in the procurement of the LLINs, she stated that, *vide* a letter, Ref. MOH/ADM/1/1/2, dated 8th March, 2023, to the then CEO, KEMSA, she appointed two officers to the tender opening and evaluation committees, that is, the Director, Administration, and the Chief Finance Officer.
- 80) She submitted evidence that on 5th April, 2023, at her offices in Afya House at 4.00 pm, prior to the cancellation of the tender, GF raised concerns regarding governance and financial management gaps at the National Malaria Program, and recommended, amongst others, the redeployment of officers alleged to be participating in prohibited practices. She however, recommended the retention of the said officers with a view towards first establishing the facts.
- 81) It was further her submission that she was kept in the dark regarding the cancellation of the tender, and that she received news of her termination from office from the media. Noting that she would not challenge the appointing authority, she nonetheless called for a fair administrative process in dealing with the issue.

A copy of the written submissions by Dr. Josephine Mburu have been attached hereto as Annex 5.

B. Submissions by Hon. Daniel Rono, immediate former Chairperson, Board of KEMSA

- 82) The Committee met with Hon. Daniel Rono, immediate former Chairperson, KEMSA, during its sittings held on Tuesday, 6th June, 2023. A summary of his submissions is provided below.

- 83) In his submissions, Hon. Daniel Rono, former Chairperson, KEMSA Board, stated that he had served in the capacity of Chairperson of the KEMSA Board for three months prior to his ouster.
- 84) He stated that the Board was first briefed about the tender when it was extended in February, 2022, and then later on at a meeting with Global Fund that was held in April, 2023, in Naivasha.
- 85) He further stated that the Board never benefited from a full briefing on the tender owing to the fact that it was not fully constituted.
- 86) Further, it was his testimony that by the time the tender was being revoked, the Board had not been fully constituted.

C. Submissions by Ms. Terry Ramadhani, immediate former CEO, KEMSA

- 87) The Committee met with Ms. Terry Ramadhani, immediate former CEO, KEMSA, during its sittings held on Tuesday, 6th June, 2023, and Wednesday, 12th July, 2023. A summary of her testimony is provided below.
- 88) In her statement, Ms. Terry Ramadhani, former CEO of KEMSA, stated that KEMSA received a request to initiate the procurement process of the LLINs in November, 2022.
- 89) Following a review of the draft KEMSA tender document by Global Fund on 16th January, 2023, KEMSA published an invitation to tender on 31st January, 2023, in the Standard Newspaper, the Public Procurement Information portal and the KEMSA website. Thereafter, a pre-bid conference was held on 10th February, 2023.
- 90) On 21st February, 2023, she received a letter, Ref. MOH/ADM/1/1/2, dated 21st February, 2023, from the Principal Secretary, State Department for Public Health and Professional Standards, informing her of an inconsistency in the tender specifications for the LLINs, and seeking clarity on the specifications under Table 7 of the tender on 'synergistic Piperonyl Butoxide (PBO)' combination nets (*Annex 4*). It was the testimony of the former CEO that the letter had a material impact on the tender process as it touched on the technical specifications of the tender.
- 91) Following receipt of the letter, in consideration of the fact that the clarification sought was material, on 23rd February, 2023, KEMSA extended the tender to 10th March, 2023, to allow for consultation on the clarification sought by the Ministry of Health.
- 92) She defended her decision to act on the letter, Ref. MOH/ADM/1/1/2, dated 21st February, 2023, by the Principal Secretary, State Department for Public Health and Professional Standards, noting that despite the fact that KEMSA principally acted on behalf of the Global Fund Principal Recipient based in the

National Treasury, it would have been insubordinate to fail to act on instructions issued to KEMSA by the parent Ministry through the Principal Secretary's office.

- 93) She further clarified that the decision to extend the LLIN tender from 23rd February, 2023, to 10th March, 2023, was not done in consultation with the Global Fund Principal Recipient at the National Treasury, for whom KEMSA was acting as the procuring agent, as it was an operational matter that required urgent action.
- 94) Further, she noted that the letter from the PS was received on the last day of the tender i.e. 22nd February, 2023. Given that the tender was set to close the next day i.e. 23rd February, 2023, on the advise of the procurement department, she made the urgent decision to book space in the papers on the same day i.e. 22nd February, 2023, in order to inform all interested parties that the tender was not going to close as scheduled.
- 95) She further submitted that *vide* letter, Ref. EA/FA/240/119/'D'/10, dated 24th February, 2023, the Global Fund Principal Recipient domiciled at the National Treasury advised KEMSA to proceed with the tender document as approved by Global Fund. The letter further notified her that LLINs procured by the Global Fund Grant were pyrethroid LLINs and not PBO LLINs.
- 96) Accordingly, the tender closed and was opened on 10th March, 2023, with 17 bidders submitting their bids as follows -
- | | |
|---|---|
| a. V. K. A Polymers Pvt Ltd | j. Lanmax Solutions Limited |
| b. Shobikaa Impex Private Limited | k. Apicalmed Limited |
| c. Tianjin Yorkkool International Trading Co. Ltd | l. Mtoria Agency |
| d. Vestergaard Sarl | m. Patanha Enterprises |
| e. Medsun Limited | n. Globeco East Africa Limited |
| f. A To Z Textile Mills Ltd | o. Winnsur General Supplies Company Limited |
| g. Premium Movers Limited | p. Togi Investments (K) Limited |
| h. Partec East Africa Limited | q. Home Fix Limited |
| i. Bilidola Services | |
- 97) A Tender Evaluation Committee comprising officers from the Ministry of Health and KEMSA was then appointed on 16th March, 2023, with the tender evaluation process being conducted on 23rd and 24th March, 2023. The evaluation process consisted of three strategies, namely -
- Preliminary Evaluation
 - Technical Evaluation
 - Financial Evaluation

- 98) Following the conclusion of the evaluation process, the bid evaluation report was signed on 28th March, 2023. Due diligence was conducted thereafter.
- 99) On 11th April 2023, the tender evaluation report was submitted to the Global Fund Country Team for pre-award review.
- 100) In its report dated 25th April, 2023, Global Fund noted that KEMSA had failed to apply the evaluation criteria consistently to all bidders, and that none of the bidders met the minimum requirements.
- 101) Specifically with regards to the two bidders that KEMSA had found responsive, that is, VKA Polymers Pvt Ltd, and Shobikaa Impex Private Limited, Global Fund noted that both bidders were non-responsive owing to non-pagination of their tender securities.
- 102) It was, however, her submission that a proper reading of the tender document provided for the bid security to be submitted separately from the tender documents. She further noted that in some instances, bid securities were even submitted by email. In addition, she noted that declaring a bidder non-responsive on the basis of non-pagination of the bid security was unprecedented at the Authority.
- 103) The Global Fund report found Tianjin Yorkool International Trading Co. Ltd responsive at Preliminary Evaluation. She however submitted that KEMSA found it non-responsive at the technical evaluation stage owing to its sample being submitted from Yorkool Chemicals (Cangzhou) Co. Ltd and not the bidder. She further stated that the bidder did not submit any documentary evidence to prove that there was a link between the two companies.
- 104) In the interests of ensuring that the malaria nets were delivered according to the set timelines, Global Fund opted to procure the nets directly from their end through Wambo.Org. This decision was communicated to KEMSA at a meeting held on 27th April, 2023, which was now left with the function of warehousing and distribution.
- 105) She further testified that during the meeting between Global Fund and the KEMSA Board and management, the management of KEMSA raised issues with the views taken by the Global Fund Local Agent in terms of the tender evaluation as follows -
- a) GF shared their pre award review report in which they sequenced the events, procedural observations, conclusions and recommendations. The report formed the basis of their deliberations.
 - b) The GF document reported that the bid bond for Shobika Impex was not paginated. The management of KEMSA argued that the bid bond was not part of the bid, but was rather an accompaniment.

- c) The GF reported that the bid bond for Partec Ltd was not paginated. The management of KEMSA argued that the bid bond was not part of the bid, but was rather an accompaniment, and further, that the pagination was sequential and well laid out even in the table of contents.
- d) The GF report found Tianjin Yorkool International Trading Ltd responsive. However, the management of KEMSA argued that it was unresponsive because whilst the bidder was Tianjin Yorkool International Trading Ltd, they were not manufacturers. The sample they submitted was from Yorkool Chemicals (Guangzhou) Co. Ltd.

There was however, no manufacturer authorization as per the tender requirements. She noted that while the two companies had the name Yorkool, they were two distinct legal entities, and that no documentation had been provided linking them beside the bid document and the sample.

- e) She further noted that GF held that for the Partec bid, the Manufacturer Authorization for PPP Hollandi DMCC indicated a different manufacturing site from the manufacturer's main address. The management of KEMSA argued that Partec provided documents to show that the manufacturer whose authorization they held had manufacturing sites in Pakistan where the product would be coming from.

- 106) Notwithstanding KEMSA's reservations, in a letter dated 4th May, 2023, the Ag. Director, Procurement, recommended termination of the process. The CEO approved, and on 5th May, 2023, the termination was communicated to all the bidders.
- 107) It was further her testimony that the Authority had struggled to maintain its autonomy owing to undue interference from the Cabinet Secretary for Health. For instance, she stated that on 22nd March, 2023, she received a note from the CS asking her to assist a certain Mr. Ken Ogolla accordingly. This had followed public statements made by the CS at an event in which she questioned the conduct of the former CEO, and stated that she had assigned an unidentified individual to assist KEMSA in the pre-qualification of suppliers.
- 108) She further stated that in an effort to strengthen the end to end visibility of the Authority's operations, she had sought permission from MoH to install an off-the-shelf Enterprise Resource Planning (ERP) system. This had however been denied.
- 109) Concerning loss of public funds, she submitted that KEMSA did not lose public funds, but did lose Ksh. 70 million in business.
- 110) She stated that she had not been given the opportunity to review and respond to the audit report by the Public Procurement Regulatory Authority (PPRA), particularly with regards to its findings on the tender evaluation.

- 111) She further submitted that despite any issues that may have taken place with regards to the tender, the action taken against her and the board was unwarranted in proportion, and that she and others had been denied fair administrative action. And further that, due process was not followed in accordance with the procedures of the Employment Act. She further appealed to the Committee to vindicate and give her reprieve in consideration of her otherwise unblotted career record, and her livelihood and that of her family.

*A copy of the written submissions by Ms. Terry Ramadhani have been attached hereto as **Annex 6**.*

D) Submissions by Hon. (Eng.) Peter Tum, OGW, Principal Secretary, State Department of Sports and immediate former Principal Secretary, State Department of Medical Services, Ministry of Health

- 112) The Committee met with Hon. (Eng.) Peter Tum, OGW, Principal Secretary, State Department of Sports, and immediate former Principal Secretary, State Department of Medical Services, Ministry of Health, during its sitting held on Tuesday, 4th July, 2023. A summary of his testimony is provided below.
- 113) He stated that he worked in the Ministry of Health as the Principal Secretary, State Department of Medical Services from 2nd December, 2022, to 16th May, 2023.
- 114) Executive Order No. 1 of 2023, dated 6th January, 2023, explicitly assigned the Malaria and TB functions to the State Department of Public Health and Professional Standards, while the HIV function was assigned to the State Department of Medical Services. In the same Executive Order, KEMSA was placed in the State Department of Medical Services as one of its Semi-Autonomous Government Agencies (SAGA).
- 115) Regarding the distinct roles and responsibilities between the State Department of Medical Services, of which he was in charge, and the State Department of Public Health and Professional Standards in relation to the procurement, he stated that the responsibility for the procurement of the LLINs fell under the State Department of Public Health and Professional Standards as the user department. As such, the planning, technical support and procurement of the LLINs was entirely coordinated by the State Department of Public Health and Professional Standards in accordance with Executive Order No. 1 of 2023.
- 116) Further, as a SAGA, KEMSA had an independent Board of Directors, where he was represented as the Principal Secretary. As such, KEMSA did not report to him on a day to day basis.
- 117) With regards to the processes of approval involving the National Treasury (TNT), the Ministry of Health (MOH), KEMSA and Global Fund in relation to

the grant, he submitted that Kenya had three (3) Principal Recipients of the Global Fund Grant as follows: The National Treasury as the State Principal Recipient, and AMREF and Red Cross as the Non-State Principal Recipients.

- 118) He further stated that the National Treasury, as the Principal Recipient, had 5 sub-recipients in the Ministry of Health as follows: HIV/AIDS program (NASCOP), TB program, Malaria Program, National Aids Control Council/National Syndemic Diseases Control and Resilient Health Systems Strengthening Program (RHSSP).
- 119) In accordance with Executive Order No. 1, each sub-recipient was responsible for developing its own work plan and procurement plan through their respective Principal Secretaries. Sub-recipients were further responsible for developing the technical requirements, following which the National Treasury approved procurement through KEMSA.
- 120) Further, under the Global Fund Grant Agreement, KEMSA was appointed the procurement agency of the National Treasury who was the Principal Recipient.
- 121) Noting that the funds for the procurement of Global Fund commodities were held at National Treasury, he clarified that while KEMSA was the appointed procurement agency for the Principal Recipient, the Ministry of Health only provided a technical support role.
- 122) He further clarified that in line with Executive Order No. 1, he had no role in the development of the tender specifications of the LLINs, or in the selection of WHOPEs-approved pyrethroid LLINs as opposed to synergistic Piperonyl Butoxide (PBO) combination nets.
- 123) It was his testimony that he was not made aware of the letter, Ref. MOH/ADM/1/1/2, dated 21st February, 2023, by Dr. Josephine Mburu, immediate former Principal Secretary, State Department of Public Health and Professional Standards, to the CEO, KEMSA, informing her of an inconsistency in the tender specifications for the LLINs, and seeking clarity on the specifications under Table 7 of the tender on 'synergistic Piperonyl Butoxide (PBO)' combination nets.
- 124) Further, he did not receive any formal communication regarding the decision by KEMSA to extend the tender from its closing date scheduled for 23rd February, 2023, to 10th March, 2023.
- 125) He further denied receiving any communication from the CEO in suspension at KEMSA, following the termination of the tender, and observed that he learnt about the termination of the tender via an email notification from GF.

A copy of the written submissions by Hon. (Eng.) Peter Tum has been attached hereto as Annex 7.

E) Submissions by Dr. Andrew Mulwa, Ag. CEO, KEMSA and immediate former Ag. DMS, Preventive and Promotive Health, MOH

- 126) The Committee met with Dr. Andrew Mulwa, Ag. CEO, KEMSA and immediate former Ag. DMS, Preventive and Promotive Health, MOH, during its sitting held on Monday, 26th July, 2023. A summary of his testimony is provided below.
- 127) He stated that he was appointed to work in the MoH as the Ag. Director Medical Services (Preventive and Promotive Health), under which the National Malaria Control Program fell, from 1st July, 2021, to 19th April, 2023.
- 128) On 12th October, 2022, he forwarded a memo to the then PS, MoH, requesting her to forward a letter to The National Treasury to procure 12,616,883 LLINs. The request provided a breakdown of the distribution of the procured nets in 22 counties with specifications.
- 129) On or around 20th February, 2023, he was informed by Dr. Ahmeddin Omar, then Head of the Malaria Control Program, MOH, that the tender advertisement for the LLINs by KEMSA had left out technical specifications for PBO-impregnated LLINs. He advised Dr. Omar to address his concerns through the established channels of communication for onward transmission to the Principal Secretary.
- 130) It was his testimony that whilst the MoH revised specifications of LLINs included “synergist Piperonyl Butoxide (PBO) LLINs – Combination nets” in addition to WHOPEs recommended pyrethroid nets, the specifications provided were generic, and designed to provide the acceptable standards for funders seeking to procure LLINs.
- 131) He noted that the MoH was supported by funders other than Global Fund, some of whom supported the procurement of PBO nets. For instance, he noted that a separate funder had supported the procurement of PBO nets for four counties in a previous campaign.
- 132) On or around 23rd February, 2023, he learned through the newspapers and The National Treasury that the LLIN tender had been extended to accommodate ‘missing specifications on PBO’ on the advice of the PS, State Department of Public Health and Professional Standards.
- 133) He alleged that at the time, he was not aware of any correspondence between the PS and KEMSA. It was his testimony that he later learnt that the PS had acted on an advisory from Dr. Omar, Head of the Malaria Program. According to Dr. Mulwa, the advisory by the Head of the Malaria Program was not processed through the Head of Department or his office.
- 134) On 6th March, 2023, following consultations with Global Fund and the National Treasury, and on advice from the Head of the National Malaria

Program dated 28th February, 2023, he wrote an advisory to the PS, State Department of Public Health and Professional Standards requesting her to write to KEMSA affirming the specifications as had been advertised, and further asking KEMSA to expedite the procurement process in view of the strict campaign timelines.

135) On 6th March, 2023, on the advice of the Head of the Malaria Program dated 28th February, 2023, he forwarded to the PS, State Department of Public Health and Professional Standards, a memo proposing technical officers to be considered for the tender opening and evaluation committees. The PS duly forwarded the proposed names for the tender opening and evaluation committees to KEMSA with some amendments.

136) In late April, 2023, he learned from the Global Fund Pre-Award Review Report that the LLINs tender was to be canceled on account of inconsistencies in the bid evaluation. At the time, he had ceased being the Director responsible for the Malaria Program.

137) To note, contrary to the testimony of Dr. Mburu, former PS, State Department of Public Health and Professional Standards, Dr. Mulwa denied any knowledge of, or participation in a briefing meeting with the then PS, State Department of Public Health and Professional Standards and the then Head of the Malaria Control Program, in which the alleged inconsistency in the tender specifications was allegedly discussed.

138) He further maintained that the advisory to the PS, State Department of Public Health and Professional Standards, on the alleged inconsistency in the technical specifications neither passed through his office, or the Head, Department of Strategic Public Health Programs, but was forwarded directly to the PS by Dr. Omar, then Head of the Malaria Control Program.

A copy of the written submissions by Dr. Mulwa has been attached hereto as Annex 8.

F) Submissions by Dr. Nazlin Ganatarra, Head, National Strategic Public Health Programs, MOH

139) The Committee met with Dr. Nazlin Ganatarra, Head, National Strategic Public Health Programs, MOH, during its sitting held on Wednesday, 12th July, 2023. A summary of her testimony is provided below.

140) She stated that she headed the Department of the National Strategic Public Health Programs from 15th July, 2020, to 19th April, 2023.

141) She submitted that as Head of the National Strategic Public Health Programs, she was responsible for coordinating the following programs -

- a. Division of National Malaria Control Program
- b. Division of National TB and Leprosy Disease program

- c. National Aids and STI Control Program
- d. National Vaccine and Immunization Program

- 142) On 17th October, 2022, she received an internal memo, Ref, No. MAL/DC/11/9/VOL.IV/88, dated 12th October, 2022, from Dr. Ahmeddin Omar, Ag. Head Division of the National Malaria Program for forwarding to the Ag. Director of Medical Services, Preventive and Promotive Health on the procurement of LLINs under the NT Malaria Global Fund Grant 2021 - 2024.
- 143) It was her testimony that she neither saw, nor forwarded the memo, Ref. MOH/DNMCP/GEN/VOL.1, dated 20th February, 2023, by Dr. Ahmeddin Omar, Ag. Head Division of National Malaria Program addressed to Ag. Director of Medical Services, Preventive and Promotive Health, citing the omission of 'Synergist Piperonyl Butoxide (PBO) - Combined nets' in table 7 of the tender specification advertised on 31st January, 2023.
- 144) It was further her testimony that she did not participate in the development of the technical specifications, as this was a function of the user department.

A copy of the written submissions by Dr. Nazlin has been attached hereto as Annex 9.

G) Submissions by Dr. Ahmeddin Omar, immediate former Head, Malaria Control Program, MOH

- 145) The Committee met with Dr. Ahmeddin Omar, immediate former Head, Malaria Control Program, MOH, during its sitting held on Wednesday, 12th July, 2023. A summary of his testimony is provided below.
- 146) He stated that the MoH, through the Division of National Malaria Control Program, had been distributing LLINs in 27 counties across the country through mass campaigns once every three years, in accordance with WHO guidelines.
- 147) In October, 2022, he submitted a request memo for the procurement of 12,616,883 LLINs to his then supervisor, Dr. Mulwa, who was then the Director for Preventive and Promotive Health for onward transmission. The memo contained details of all beneficiary counties and the numbers of LLINs planned for distribution in those counties. Also attached to the memo was the approved procurement plan and LLINs specifications.
- 148) In February, 2023, KEMSA advertised the tender for the procurement of the LLINs. He later learnt that the specifications in the advertisement were missing a one-line item as compared to the specifications that the Malaria Program had submitted. He duly informed his Director of the same, and was advised to write an advisory memo detailing the same. He then wrote the advisory memo to his Director on 20th February, 2023.

- 149) It was his testimony that he raised the alarm in the hope that a supplier would submit a bid for PBO LLINs at a cost approximate to that of the pyrethroid nets. In this regard, he noted that PBO nets were superior in quality in comparison to pyrethroid nets, and would have provided better coverage.
- 150) It was further his submission that he had kept Dr. Mulwa, then Ag. Director Medical Services, MoH, fully apprised on the goings on, and maintained that all documentation relating to the program had been forwarded through his office. He was however, unable to provide evidence that his memo dated 20th February, 2023, had been forwarded through his direct supervisor, Head, National Strategic Public Health Programs, or the Ag. Director of Medical Services/Preventive and Promotive Health.
- 151) In addition, contrary to the testimony of Dr. Mburu, former PS, State Department of Public Health and Professional Standards, he denied any knowledge of, or participation in a briefing meeting with the then PS, State Department of Public Health and Professional Standards and Dr. Mulwa, in which the alleged inconsistency in the tender specifications was allegedly discussed.

A copy of the written submissions by Dr. Ahmeddin Omar has been attached hereto as Annex 10.

H) Submissions by Ms. Mary Muthoni, HSC, Principal Secretary, State Department of Public Health and Professional Standards

- 152) The Committee met with Ms. Mary Muthoni, Principal Secretary, State Department of Public Health and Professional Standards, Ministry of Health, during its sitting held on Wednesday, 12th July, 2023. A summary of her testimony is provided below.
- 153) Regarding the movement and approval processes of a memo dated 20th February, 2023, detailing an inconsistency in specifications for LLINs for the mass net campaign for 2023/2024, she clarified that it was drafted by Dr. Ahmeddin Omar, then Ag. Head, National Malaria Control Program (Ref. MOH/DNMCP/GEN/VOL.1) and was addressed to the Ag. Director of Medical Services, Preventive and Promotive Health, through the Head, National Strategic Public Health Programs.
- 154) It was her submission that a perusal of available records on the same at the MoH had showed -
- a) A signed memo, Ref. MOH/DNMCP/GEN/VOL.1, dated 20th February, 2023, by Dr. Ahmeddin Omar, Ag. Head Division of National Malaria Program to the Ag. Director of Medical Services, Preventive and Promotive Health, through the Head, National Strategic Public Health Programs. The memo cited the omission of 'Synergist Piperonyl

Butoxide (PBO) - Combined nets' in table 7 of the tender specification advertised on 31st January, 2023.

- b) An unsigned memo, Ref. MOH/DNMCP/GEN/VOL.1/21, dated 20th February, 2023, by Dr. Andrew Mulwa, then Ag. Director of Medical Services, Preventive and Promotive Health, to the Principal Secretary;
- c) Both an unsigned and signed letter, Ref. MOH/ADM/1/1/2, dated 20th and 21st February, 2023, respectively, by the Principal Secretary addressed to the Chief Executive Officer, KEMSA.

155) She stated that upon receiving the advice *vide* memo, Ref. MOH/DNMCP/GEN/VOL.1, the then PS wrote a letter, Ref. MOH/ADM/1/1/2 dated 21st February, 2023, to the CEO, KEMSA to rectify the error and fast track the procurement process. Consequently, KEMSA amended the advert through an addendum, Ref. KEMSA/GF-ATM-Malaria-NFM-2022/2023 OIT-02, dated 27th February, 2023.

156) She submitted that the query on the specification error was as a result of the specifications forwarded to the Principal Secretary, MoH, *vide* an internal memo, Ref. MAL/DC/11/9/VOL.IV/88, dated 12th October, 2022, and subsequently forwarded by the PS, MoH, *vide* a letter, Ref. MOH/ADM/1/1/12, dated 18th October, 2022, requesting the PS, National Treasury, to instruct the procuring agent, KEMSA, to initiate the procurement process of the LLINs as per the specifications provided. She did not, however, submit certified copies of the movement registers for the memos.

A copy of the written submissions by the Principal Secretary has been attached hereto as Annex II.

I) Submissions by the Director-General, Public Procurement Regulatory Authority

157) The Committee met with Mr. Patrick Kanyugo Wanjuki, Director General, Public Procurement Regulatory Authority (PPRA), during its sitting held on Thursday, 8th June, 2023. A summary of his submissions is provided below.

158) He submitted that pursuant to Section 43 of the Public Procurement and Asset Disposal Act 2015, *vide* a letter, Ref. No. PPRA/5/69 VOL. I (72), dated 11th May, 2023, PPRA instituted an audit on tender No. GF ATM MAL NFM-2022/2023 OIT – 02 for the supply of long lasting insecticidal nets (LLINs) processed by the Kenya Medical Supplies Authority (KEMSA).

159) He stated that *vide* a letter, Ref. No. KEMSA/CEO/PPRA/23/05/15(01) dated 15th May, 2023, KEMSA submitted the documents used to process the subject tender.

160) He further submitted that in its audit, the Authority had established the following -

- a) The procuring entity did not prepare a procurement plan for the subject procurement contrary to the requirements of Section 53(2) of the Act;
- b) On behalf of the user department i.e. Dr. Ahmeddin Omar, Ag. Head, Division of National Malaria Programme, Ministry of Health, developed specifications which were issued to the procuring agent i.e. KEMSA for procurement of the nets, the specifications had two requirements for the nets under table No. 7 Insecticide Impregnation – Technology requirements as follows -
 - Treated with WHOPES recommended insecticide (see link to their website ...) incorporated/coated into netting material to ensure wash resistance of the insecticide for at least 20 washes; and
 - Synergist Piperonyl Butoxide (PBO) LLINs – Combination nets.
- c) The specifications issued by the Ministry of Health which is the user department had the requirement of “Synergist Piperonyl Butoxide (PBO) LLINs – Combination nets”. The tender document issued to bidders on page 85 omitted the requirement.
- d) The interview conducted by the audit team with the Global Fund coordinator’s representatives indicated that the specifications issued by the Ministry of Health under table No. 7 had two requirements of nets and that the two requirements could not be procured in the same tender. Therefore the procuring entity i.e. KEMSA was required to choose either of the two.
- e) Based on past procurements under Global Fund and due to budget constraints, the procuring entity choose the requirement of “Treated with WHOPES recommended insecticide incorporated/coated into netting material to ensure wash resistance of the insecticide for at least 20 washes” as opposed to “Synergist Piperonyl Butoxide (PBO) LLINs” which was more expensive. Furthermore, Global Fund had always funded pyrethroid nets, as opposed to PBO nets. Accordingly, KEMSA was directed to maintain the requirement as per the Global Fund’s requirement.
- f) The audit team took note of a letter, Ref: EA/ FA/240/119/”D”/ (10), dated 24th February, 2023, by Mr. Simon Kibia, advising KEMSA to proceed with the procurement using the tender document as approved by Global Fund.
- g) At the evaluation stage, the audit team established that only two bidders passed the preliminary evaluation and proceeded to the technical evaluation i.e. Bidder No. 3 - Tianjin Yorkool International Trading Co. Ltd, and Bidder No. 7 - Premium Movers Limited contrary to the evaluation committee which declared five (5) bidders.

- h) The evaluation committee ought to have evaluated the tender in compliance with the provisions of Section 80(2) of the Act. A review of the evaluation report by Global Fund indicated various areas of non - compliance on the evaluation of the tender. The audit team concurred with the Global Fund findings.
 - i) The audit team did not conduct sample evaluation.
 - j) The termination of the tender complied with Section 62 of the Act and Global Fund Guidelines.
- 161) He further observed that the Global Fund procurement policy provided that the applicable law for the procurement was the Public Procurement and Asset Disposal Act, 2015, however, the procuring entity was at discretion to use the Global Fund pooled procurement mechanism. This therefore meant the entity could choose to procure using the PPADA or the Global Fund procurement mechanism.

a) Tender Requisition

- 162) With regards to the procurement initiation, he stated that the requisition for the subject procurement was done *vide* letter, Ref. No. EA/FA/240/119/“D”/(3), dated 7th November, 2022, by Mr. Stephen Muiruri, Global Fund Coordinator to the Accounting Officer of the Procuring entity. The requisition indicated the budget for the subject procurement as follows:

| Item | Unit cost (USD) | Quantity | Total Budget (USD) |
|---------------------------------------|--------------------|-------------------|-----------------------|
| Polyethylene LLIN | 2.23 | 6,498,952 | 14,492,662.96 |
| Polyester LLIN | 2.23 | 6,117,929 | 13,642,981.67 |
| Total LLINs | | 12,616,881 | 28,135,644.63 |
| 5% PSM Cost | | | 1,406,782.23 |
| Total commodity + PSM Cost | | | 29,542,426.86 |

- 163) The requisition indicated that the drop –off points for the LLINs would be at KEMSA central and regional warehouses, and that KEMSA would be expected to transport the LLINs using the service providers to the lower – level drop – off points.
- 164) The requisition indicated the distribution by county, type of net and quantity and attached the specifications from the Ministry of Health, Directorate of

Medical Services/Preventive and Promotive Health – National Malaria Control Programme signed by Dr. Ahmeddin D. Omar, Ag. Head – Division of National Malaria Programme.

b) Tender Documentation

- 165) He further stated that KEMSA was obligated to send the draft tender documentation and annexes to the National Treasury and the Global Fund for review prior to launching of the tender.
- 166) KEMSA used the standard tender document for procurement of goods issued by the Authority pursuant to PPRA circular No. 02/2022. The tender document indicated that there was to be a pre- bid conference at KEMSA tender opening Hall on 10th February, 2023 at 9.00 am.
- 167) PPRA found that the tender document was well customized and had the evaluation criteria specified under Section III. However, a review by Global Fund recommended review of the table of content, continuous pagination and consistent correct referencing of sections. The Global Fund review further recommended that -
- a) KEMSA should ensure that the revised total quantities are presented correctly and consistently throughout the tender document. That the document which was submitted had different quantities on page No. 73/121, 91/121 and 83/121;
 - b) The tender document only included a general reference to the “WHOPES Scheme” on page No. 84/121 for the polyester LLINs and on page 88/121 for the polyethylene LLINs, and appeared to exclude LLINs that did not receive a WHOPES recommendation but were WHO prequalified (or ERP approved);
 - c) The addition of website links of WHO prequalified Vector Control products and GF list of insecticide Treated Nets website for quality assurance;
 - d) The procurement request indicated three colors: “light blue, white and light green” whereas the tender document indicated light blue only. KEMSA was advised to confirm the final color and ensure concurrence with the DNM final color specification for the final tender document version.

He confirmed that KEMSA amended the tender document as per the Global Fund recommendations.

c) Invitation to Tender

- 168) With regards to the tender invitation, he observed that KEMSA published the invitation to tender (Open International Tender) on 31st January 2023 in the

Standard Newspaper, the Public Procurement Information Portal (PPIP) and KEMSA website.

- 169) The invitation indicated that the tender opening was to be done on 23rd February, 2023 at 10.00 am.
- 170) A pre-bid conference was held on 10th February 2023 at 9:00am in KEMSA Tender Opening Hall.

d) Tender Extension

- 171) The tender was extended on 23rd February 2023 to allow for consultation on the clarification sought by the Ministry of Health on an inconsistency in the technical specifications for the LLINs.
- 172) The Principal Secretary Dr. Josephine Mburu, *vide* a letter, Ref. No. MOH/ADM/1/1/2, dated 21st February, 2023, raised concerns with the specifications indicated in the tender document as follows: *“The specification under table 7 insecticide impregnation part 1 Technology misses the requirement No. 2 Synergist Piperonyl Butoxide (PBO) LLINs – Combination nets which is inconsistent with specifications that were shared by MOH-DNMP”*.
- 173) Consequently, KEMSA, *vide* a letter, Ref. KEMSA/GF-PROC/23 (23), dated 22nd February, 2023, notified the Global Fund Principal Recipient at the National Treasury of the extension of the tender from the scheduled 23rd February, 2023, to 10th March, 2023, to allow room for responding to clarifications, modification of the tender and submission of the same.
- 174) The tender extension was published in the Standard and Daily National newspapers, KEMSA Website and PPIP Portal on 23rd February 2023 indicating New Tender Closing of 10th March 2023 at 10am.
- 175) The Global Fund Principal Recipient *vide* letter, Ref: EA/ FA/240/119/”D”/ (10), dated 24th February, 2023, by Mr. Simon Kibia, advised the procuring entity to proceed with the procurement using the tender document as approved by the Global Fund. The letter stated that the LLINs procured by Global Fund Grant were pyrethroid LLINs and not PBO LLINs therefore the requirement for Synergist Piperonyl Butoxide (PBO) LLINs should not be included in the tender document as part of the technical specifications.

e) Clarity on the Tender Specifications

- 176) The specifications for the subject procurement were prepared by the Ministry of Health by Dr. Ahmeddin D. Omar, Ag. Head- Division of National Malaria Programme, of which PBO nets were included.

177) The audit team established that the specifications issued by the Ministry of Health which was the user department had the requirement of “Synergist Piperonyl Butoxide (PBO) LLINs – Combination nets”.

178) A letter, Ref: EA/ FA/240/119/”D”/ (10), dated 24th February, 2023, by Mr. Simon Kibia, advising the procuring entity to proceed with the procurement using the tender document as approved by the Global Fund was in relation to a letter, Ref. No. EA/FA/240/119/”D”/ (3) dated 7th November, 2022 by Stephen Muiruri, Global Fund Coordinator which indicated *“the purpose of this letter is to request you to initiate the procurement as per the attached technical specifications”*. Of which letter included specifications for synergist Piperonyl Butoxide (PBO) LLINs – combination nets.

f) Tender Opening

179) A tender opening committee was appointed on 6th March, 2023. The tender closed and opened on 10th March 2023 at 10 am and seventeen (17) tenderers submitted their bids as follows:

| # | Bidder Name | # | Bidder Name |
|---|---|----|--|
| 1 | V.K.A Polymers Pvt. Ltd | 10 | Lanmax Solutions Limited |
| 2 | Shobikaa Impex Private Limited | 11 | Apicalmed Limited |
| 3 | Tianjin Yorkool International Trading co. Ltd | 12 | Mtoria Agency |
| 4 | Vestergaard Sarl | 13 | Patanha Enterprises |
| 5 | Medsun Limited | 14 | Globeco East Africa Limited |
| 6 | A To Z Textile Mills Ltd | 15 | Winnsur General Supplies Company Limited |
| 7 | Premium Movers Limited | 16 | Togi Investments(K) Limited |
| 8 | Partec East Africa Limited | 17 | Home Fix Limited |
| 9 | Bilidola Services | | |

- 180) The tender opening committee disregarded the bid for M/s. Apicalmed limited because Home Fix Limited had submitted the bid security to Apicalmed Limited. This was in contravention to the provisions of section 78 of the PPDA which limits the role of tender opening to only opening and recording the details of the bidders and not disqualification of the bidders.

g) Tender Evaluation

- 181) The CEO, KEMSA, *vide* letter, Ref. No. KEMSA/GF-PROC/23(031), dated 8th March, 2023, requested the Principal Secretary, State Department of Public Health to nominate an officer to be appointed to the tender evaluation committee.
- 182) The Principal Secretary *vide* letter, Ref. No. MOH/ADM/1/1/2, dated 8th March, 2023, nominated Mr. Martin Wamwea, Senior Chief Finance Officer, Chair, Lenson Kariuki, Principal Medical Entomologist, Dr. Pauline Duya, Deputy Director, Pharmaceutical Services and Livingstone Njuguna, Procurement Officer.
- 183) The Accounting Officer *vide* letter Ref. No. KEMSA/GF-ATM/MAL-OIT 002/23 dated 16th March appointed the following officers to the evaluation committee

| S/No | Name | Position |
|------|----------------|-----------|
| 1. | Martin Wamwea | Chair |
| 2. | Lenson Kariuki | Member |
| 3. | Cosmas Rotich | Member |
| 4. | Anthony Chege | Secretary |

- 184) The tender evaluation committee met and conducted the evaluation process on 23rd and 24th March 2023. The evaluation was in three stages as follows: Preliminary Examination, Technical Evaluation, Financial Evaluation.
- 185) At the preliminary stage of evaluation, the evaluation committee declared the following bidders as responsive:
- a) Bidder 1: V.K.A Polymers Pvt Ltd
 - b) Bidder 2: Shobikaa Impex Private Limited
 - c) Bidder 3: Tianjin Yorkool International Trading Co. Ltd
 - d) Bidder 7: Premium Movers Limited
 - e) Bidder 8: Partec East Africa Limited
- 186) At the technical stage of evaluation, the evaluation committee recommended the following bidders to proceed to sample/product evaluation

a) Item 001: Mosquito Nets Treated (Rectangular) Polyethylene

- Bidder 1: V.K.A Polymers Pvt Ltd;
- Bidder 2: Shobikaa Impex Private Limited

b) Item 002: Mosquito Nets Treated (Rectangular) Polyester

- Bidder 8: Partec East Africa Limited

187) The evaluation committee recommended the following bidders to proceed to financial evaluation

a) Item 001: Mosquito Nets Treated (Rectangular) Polyethylene

- Bidder 2: Shobikaa Impex Private Limited

b) Item 002: Mosquito Nets Treated (Rectangular) Polyester

- Bidder 8: Partec East Africa Limited

188) At the financial evaluation, the evaluation committee the following bidders for award: Item 001: Mosquito Nets Treated (Rectangular) Polyethylene

| S/ N o. | Bidder Name | UoM | Qty | Unit Price | Total Price |
|---------------|---|-------|-----------|------------|------------------|
| 2 | Shobikaa Impex Private Limited | Piece | 4,285,700 | US\$2.20 | US\$9,428,540.00 |

189) Item 002: Mosquito Nets Treated (Rectangular) Polyester

| S/ No | Bidder Name | UoM | Qty | Unit Price | Total Price |
|----------|-------------------------------------|-------|-----------|------------|-------------------|
| 8 | Partec East Africa Limited | Piece | 5,929,301 | US\$2.48 | US\$14,704,666.48 |

The evaluation committee signed the evaluation report on 28th March, 2023.

g) Due Diligence

190) The evaluation committee conducted due diligence on the successful bidders and noted that all the bidders met the requirements. The due diligence report was signed by all the members on 4th April, 2023

h) Global Fund Review of the evaluation Report

191) A review by Global Fund found that there was no responsive bid. Given the commitment to ensure that the nets were available at the right time, and considering the long process obtaining through PPDA, Global Fund resolved to purchase the nets through *wambo.org* immediately to secure the timelines slated for November 2023. Warehousing and distribution would be through KEMSA as per previous arrangements in Mass Campaigns.

i) Review by PPRA

192) PPRA conducted a preliminary evaluation that compared the recommendations of the evaluation committee and Global Fund as summarized below -

| # | Bidder Name | Evaluation Committee's Findings | Global Fund Review Findings | PPRA Audit Findings |
|---|-------------------------|--|--|--|
| 1 | V.K.A Polymers Pvt. Ltd | Responsive Paginated from 1-117 pages with table of content aligned to pages. The bid was accompanied by Tender Security received in a separate envelope. | Non-Responsive Since the Tender Security was not paginated then the bid should have been declared non-responsive. | Non Responsive The tender security submitted was not paginated which was between page 68 and 69 of the copy of the bid document |

| | | | | |
|---|---|---|--|--|
| 2 | Shobikaa Impex Private Limited | <p>Responsive</p> <p>Paginated from 1-269 pages with table of content aligned to pages. The bid was accompanied by Tender Security received in a separate envelope.</p> | <p>Non-Responsive</p> <p>Since the Tender Security was not paginated then the bid could have been declared non-responsive.</p> | <p>Non Responsive</p> <p>The bidder did not paginate the bid document on page No. 1 and, 2 and the tender security was not paginated.</p> <p>The bidder submitted a board resolution, instead of power of attorney</p> |
| 3 | Tianjin Yorkool International Trading Co. Ltd | <p>Responsive</p> | <p>Responsive</p> <p>Global Fund review team agreed with evaluation committee's findings.</p> | <p>Responsive</p> <p>Bidder met all the requirements at mandatory evaluation.</p> |
| 4 | Vestergaard Sarl | <p>Non-Responsive</p> <p>Bid document was not paginated</p> | <p>Non-Responsive</p> <p>Global Fund review team agreed with evaluation committee's findings</p> | <p>Non Responsive</p> <p>The bid document is not paginated.</p> |
| 5 | Medsun Limited | <p>Non-Responsive</p> <p>Did not sign the Form of Tender and Tender security was not provided.</p> | <p>Non-Responsive</p> <p>Global Fund review team agreed with evaluation committee's findings</p> | <p>Non Responsive</p> <p>Form of tender not signed; and</p> <p>Tender security not provided.</p> |

| | | | | |
|---|----------------------------------|---|--|---|
| 6 | A To Z Textile Mills Ltd | Non-Responsive Did not provide form of tender | Non-Responsive Global Fund review team agreed with evaluation committee's findings | Non Responsive The bid documents not consistently paginated and Form of tender not signed |
| 7 | Premium Movers Limited | Responsive | Responsive Global Fund review team agreed with evaluation committee's findings | Responsive |

| | | | | |
|---|--------------------------------------|---|--|---|
| 8 | Partec East Africa Limited | Responsive Paginated from page 1-183 The bidder submitted their bid with page 30 and page 30(i) and Page 54, 54(i), 54(ii) and 54(iii). However, the pages were aligned in the table of content presented in the bid document. | Non-Responsive The Global Fund review findings was that the bidder's bid was not sequentially paginated having pages 30 and 30(i) and Pages 54, 54(i), 54(ii) and 54(iii) and therefore the bid should have been declared non-responsive. | Non Responsive Not sequentially paginated having pages 30 and 30(i) and Pages 54, 54(i), 54(ii) and 54(iii) |
|---|--------------------------------------|---|--|---|

| | | | | |
|----|--------------------------|---|---|---|
| 9 | Bilidola Services | Non-Responsive Did not sign Certificate of Independent Tender Determination | Non-Responsive Global Fund review team agreed with evaluation committee's findings | Non-Responsive- Did not sign Certificate of Independent Tender Determination |
| 10 | Lanmax Solutions Limited | Non-Responsive Did not sign the Form of Tender | Non-Responsive Global Fund review team agreed with evaluation committee's findings | Non Responsive- Tender security not valid, it was expiring on 10 th July, 2023 instead 7 th August, 2023 Form of tender on page No. 48 not signed. |
| 11 | Apicalmed Limited | Non-Responsive No bid submitted (refer to bidder no. 17) | Non-Responsive Global Fund review team agreed with evaluation committee's findings | No bid submitted (refer to bidder no. 17) |
| 12 | Mtoria Agency | Non-Responsive Did not sign Certificate of Independent Tender Determination | Non-Responsive Global Fund review team agreed with evaluation committee's findings | Non Responsive - Did not sign Certificate of Independent Tender Determination on page 74 |
| 13 | Patanha Enterprises | Non-Responsive Did not sign Certificate of Independent Tender Determination. | Non-Responsive Global Fund review team agreed with evaluation committee's findings | Non Responsive- Did not sign Certificate of Independent Tender Determination on page 81 |

| | | | | |
|----|--|--|---|---|
| 14 | Globeco East Africa Limited | Non-Responsive Provided wrong format of the Form of Tender | Non-Responsive Global Fund review team agreed with evaluation committee's findings | Non Responsive- Tender security not paginated and Provided wrong format of the Form of Tender on page 49-51. |
| 15 | Winnsur General Supplies Company Limited | Non-Responsive Provided a Tax Compliance Certificate (TCC) number KRAEON12885279 22 that belongs to Urbkan Spot Company Ltd following TCC Checker verification. | Non-Responsive Global Fund review team agreed with evaluation committee's findings | Non-Responsive Provided a Tax Compliance Certificate (TCC) number KRAEON1288527 922 that belongs to Urbkan Spot Company Ltd following TCC Checker verification |
| 16 | Togi Investments (K) Limited | Non-Responsive Tender security valid up to 21st July 2023 instead of 7th August 2023. | Non-Responsive Global Fund review team agreed with evaluation committee's findings | Non Responsive Power of attorney to Chris Gitonga Kobia but documents are signed by Tony Kinoti Kobia; Tender security valid up to 21st July 2023 instead of 7th August 2023. |

| | | | | |
|----|------------------|--|---|--|
| 17 | Home Fix Limited | Non- Responsive Tender security issued to Apicalmed Limited | Non-Responsive Global Fund review team agreed with evaluation committee's findings | Non- Responsive Tender security issued to Apicalmed Limited |
|----|------------------|--|---|--|

193) The PPRA audit found that only two bidders qualified to proceed to the technical evaluation as follows:

- Bidder No. 3 - Tianjin Yorkool International Trading Co. Ltd
- Bidder No. 7 - Premium Movers Limited

194) To note, the PPRA audit team only evaluated document examination. Product evaluation was not conducted because the samples used were not submitted to the Authority.

195) The PPRA audit team further found that the evaluation committee did not strictly adhere to the evaluation criteria as per Section 80(2) of the Act.

j) Professional Opinion

196) *Vide* memo, Ref. No. KEMSA/OIT 02/PPO No. 237/2022-2023, dated 4th May, 2023, the Head of Procurement at KEMSA gave a professional opinion. The opinion indicated that since Global Fund had decided to move the procurement to *wambo.org*, the procurement process would be terminated. The Accounting Officer signed and concurred with the opinion and approved the recommendation for termination.

197) This was pursuant to -

- a) Section 6 (1) of the PPDA stipulates that “*Subject to the Constitution, where any provision of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified by Kenya and to which Kenya is party, the terms of the treaty or agreement shall prevail*”;
- b) Section II-Tender Data Sheet ITT 16.3b of the tender document stated that “*in the event of a conflict between the Public Procurement and Asset Disposal Act and the Global Fund’s PSM Policies, the Global Fund’s PSM Policies shall prevail*”.

k) Tender Award and Notification

198) *Vide* letter, Ref. GF ATM MAL NFM -2022/2023 OIT-02 dated 5th May, 2023, KEMSA notified all the bidders that they were unsuccessful and the

reasons were indicated in the letters in accordance with section 87 of the PPDA.

A copy of the written submissions by PPRA has been attached hereto as Annex 12.

J) Submissions by the Global Fund Coordinator, Global Fund Coordination and Management Unit, The National Treasury

199) The Committee met with the Global Fund Coordination and Management Unit at TNT led by Dr. Stephen Muiruri, during its sitting held on Tuesday, 4th July, 2023. A summary of their submissions is provided below.

200) With regards to the various approval processes, procedures, guidelines and/or mandatory requirements of Global Fund in relation to the procurement of long-lasting insecticide treated nets (LLINs), the GF Coordinator submitted that the Division of National Malaria Program (DNMP) carried out a quantification to determine the quantity of nets required for the mass campaign. This was submitted to the GF in July, 2022, and was subsequently reviewed.

201) The quantification and approved the procurement of 12,616,881 LLINs on 2nd September, 2022, as summarized below -

| ITEM | QUANTITY | TYPE |
|--|------------|--|
| Total No. of nets needed for the mass campaign | 18,485,300 | <ul style="list-style-type: none"> - Polyester pyrethroid - Polyethylene pyrethroid - Polyester PBO |
| No. to be funded under GF | 12,616,881 | <ul style="list-style-type: none"> - Polyester pyrethroid - Polyethylene pyrethroid |
| No. to be funded under the US President's Malaria Initiative (PMI) | 3,893,383 | <ul style="list-style-type: none"> - Polyethylene PBO - Polyester PBO |
| Total Funded Nets | 16,510,264 | <ul style="list-style-type: none"> - Polyester pyrethroid - Polyethylene pyrethroid - Polyester PBO - Polyethylene PBO |
| Unfunded nets | 1,975,037 | <ul style="list-style-type: none"> - Polyethylene |

| | | |
|--|--|------------|
| | | pyrethroid |
|--|--|------------|

- 202) He clarified that whereas GF was earmarked to procure pyrethroid nets, PMI was to procure PBO nets.
- 203) The role of the MoH was to raise the procurement requisition and to provide specifications, while TNT was responsible for reviewing the procurement requisition for conformity to approved GF commodities, and approving KEMSA to initiate the procurement.
- 204) Following the approval of the procurement, the MoH submitted a procurement requisition for 12.6 million nets, and the technical specifications of the LLINs. The requisition was received in the National Treasury on 30th October, 2022, and TNT wrote to KEMSA to initiate procurement of the nets on 7th November, 2022.
- 205) In mid-November, 2022, it was noted that the available funding under GF could only procure 10,215,000 nets instead of the 12.6 million nets originally approved.
- 206) In December, 2022, KEMSA submitted a draft tender document to GF for review. The GF reviewed the tender document in January, 2023, and gave its feedback on the tender document, indicating that the quantity of nets to be procured should be reduced to 10.2 million. The same was communicated to KEMSA in January, 2023, and the tender was published on 31st January, 2023.
- 207) Regarding the Global Fund guidelines for the procurement of the LLINs, the GF Coordinator submitted that KEMSA was required to comply with the Global Fund Policy for Procurement and Supply Management, and the Public Procurement and Asset Disposal Act, 2015, and Public Procurement Regulations, 2020. He further submitted the following mandatory requirements of the GF in relation to the procurement -
- a. Prior to publishing the tender KEMSA was required to share the tender document with GF for review; and
 - b. Submission of the Tender Evaluation Committee report to GF for pre-award review.
- 208) Other requirements that KEMSA was expected to comply with included -
- a. The procurement request from the NT;
 - b. The DNMP technical specifications for LLIs;
 - c. WHO technical specifications for LLINs;
 - d. The DNMP LLIN delivery schedule; and
 - e. GF recommendations regarding drop-off points.
- 209) Tender specifications were submitted by the MoH based on four parameters (color, material, insecticide impregnation and shape) as outlined below -

| Parameter | Options | Determination of LLIN parameters |
|--------------------------|--|---|
| Colour | <ul style="list-style-type: none"> - Light blue - White - Light green | <ul style="list-style-type: none"> - Light blue is used for mass campaigns - White is used for routine distribution |
| Material | <ul style="list-style-type: none"> - Polyester - Polyethylene | <ul style="list-style-type: none"> - Polyester LLINs are used in the lake and coastal endemic areas - Polyethylene LLINs are used in other counties e.g. highlands |
| Insecticide impregnation | <ul style="list-style-type: none"> - Pyrethroid - Synergist piperonyl butoxide (PBO) | <ul style="list-style-type: none"> - Pyrethroid LLINs are used in counties without insecticide resistance - PBO LLINs are used in counties with reported pyrethroid resistance, namely, Bungoma, Homa Bay, Kakamega, Vihiga and Kuria West and Kuria East in Migori County. |
| Shape | <ul style="list-style-type: none"> - Rectangular - Conical | <ul style="list-style-type: none"> - Rectangular shape is preferred by users. |

210) KEMSA subsequently received the specifications from DNMP, MoH, that were relevant for the GF procurement i.e rectangular, light blue, polyester/polyethylene pyrethroid nets.

211) On whether due process was followed by KEMSA (including obtaining the necessary approvals) during successive stages of the procurement process, including: development of the tender specifications; advertisement of the tender; tender opening; tender evaluation; and, award of tender, he reported that KEMSA followed due process as follows -

- a) On the approval of the tender, he noted that the procurement was approved by the CEO;

- b) The tender specifications were in line with the MoH specifications and GF requirements;
 - c) The tender advertisement was done through the Government Advertisement Agency and published in the Standard newspaper, KEMSA website and Public Procurement Information Portal on 31st January, 2023; and
 - d) The tender opening was guided by provisions of section 78, sub-section 3-1, of the Public Procurement and Asset Disposal Act, 2015.
- 212) The GF pre-award review took issue with the tender evaluation whereby it found that there were several instances where the evaluation was not done in line with the criteria stipulated in the tender document, sections 80 and 86 of the PPAD Act, 2015, and GF guidance. As such, the tender did not proceed to the notification and award stage following a directive from GF to conduct the procurement through the GF pooled procurement mechanism i.e. wambo.org.
- 213) Following the cancellation of the tender at KEMSA, TNT placed an order for 10.2 million nets on the wambo.org website, and procurement was subsequently done in line with technical specifications provided by the MoH, and as had been approved by the GF.
- 214) The LLINs had been allocated to two manufacturers, one supplying polyethylene nets and the other the polyester nets. The nets were expected to be delivered in November, 2023, in time for the mass campaign which was scheduled to take place from November, 2023 to January, 2024.
- 215) Further, prior to the cancellation of the tender, differences arose between the GF team, and the immediate former PS, State Department of Public Health and Professional Standards with regards to the operations and goings-on at the DNMP, MoH. It was noted that these differences may have played a role in the final decision by GF to terminate the tender process at KEMSA.

*A copy of the written submissions by the Global Fund Coordination and Management Unit has been attached hereto as **Annex 13**.*

K) Submissions by the Kenya Medical Supplies Authority (KEMSA)

- 216) The Committee met with Mr. Irungu Nyakera, Chairperson, KEMSA, during its sitting held on Tuesday, 25th July, 2023. A summary of his submissions is provided below.
- 217) KEMSA received a request to initiate procurement from TNT *vide* a letter, Ref. No. EA/FA/240/119/'D'/(3), dated 7th November, 2022, and received in KEMSA on 8th November, 2022.
- 218) The letter detailed the GF requirements on procurement and delivery of the LLINs including drop-off points for the LLINs, and the requirement for

KEMSA to send the draft tender documentation and annexures to TNT and GF for review prior to launching the tender.

- 219) Approval to commence procurement through an Open International Tender was sought from the then CEO, KEMSA *vide* a memo dated 16th November, 2022, and approved on 18th November, 2022.
- 220) On 28th November, 2022, via email, KEMSA invited the DMCP and TNT for a virtual meeting to discuss drop off points and the delivery schedule to be incorporated in the tender.
- 221) On 9th December, 2022, the bid document was prepared and forwarded to the GFLA and TNT for review.
- 222) GF provided feedback on the tender documents *vide* a report dated 16th January, 2023, in which it recommended the following amendments -
 - a) Amendment of the quantity of LLiNs from 12,616,881 to 10, 215,000;
 - b) Amendment of drop-off points, in function of the updated delivery schedule, to ensure strategic placement of the LLiNs, optimization of the regional warehouses, and enhanced efficiencies in distribution costs;
 - c) Consistent inclusion of the LLiNs to be procured, including: quantities, unit cost estimate, order time, type per county, delivery schedule and drop off points throughout the tender document.
 - d) Use of clear and precise language regarding the LLIN quality assurance requirements;
 - e) A complete and well structured table of contents;
 - f) Final agreed specifications on the color.
- 223) The report further recommended that the Moh and TNT move forward to promote the timely procurement and delivery of the LLiNs by ensuring the timely completion of the delivery schedule, applying a liquidated damages clause in case of delays in delivery, ensuring a safety margin for delivery and ensuring timely payment of suppliers.
- 224) In addition, the report recommended that TNT and DMCP act to identify opportunities for saving and reinvestment through reprogramming by 15th February, 2023.
- 225) The tender document was reviewed in line with the GF recommendations, following which KEMSA published an Open International Tender on 31st January, 2023, in the Standard Newspaper, the Public Procurement Information (PPI) portal and the KEMSA website.

- 226) A pre-bid conference was held on 10th February, 2023 at 9.00 am at the KEMSA Tender Opening Hall. Various requests for clarifications from potential bidders were duly responded to.
- 227) On 21st February, 2023, KEMSA received a letter, Ref. MOH/ADM/1/1/2 , from the PS, State Department for Public Health and Professional Standards, MoH, citing inconsistencies in the technical specifications of the nets.
- 228) Following the letter from the PS, MoH, the then CEO, KEMSA, approved an extension of the tender closing date *vide* a memo dated 22nd February, 2023.
- 229) The tender extension was published in the Standard and Daily Nation newspapers, the KEMSA website and the PPI portal on 23rd February, 2023, indicating a new tender closing date of 10th March, 2023, at 310.00 am.
- 230) *Vide* a letter, Ref. KEMSA/GF-PROC/23(23), dated 22nd February, 2023, KEMSA notified TNT of the tender extension.
- 231) TNT, *vide* a letter, Ref. EA/FA/240/1195/'D'/(10), dated 24th February, 2023, advised KEMSA to proceed with the procurement using the tender document as approved by GF.
- 232) *Vide* a letter, Ref. KEMSA/GF-PROC/23(25), dated 24th February, 2023, KEMSA responded to the PS, MoH, confirming that there was no error in the technical specifications.
- 233) Regarding the distinct roles and responsibilities between the MoH and KEMSA, he clarified that TNT was the Principal Recipient (PR) of GF, and that it had appointed KEMSA as its agent to procure, warehouse and distribute GF health products.
- 234) The MoH as the sub-recipient was supposed to submit its requirements to TNT for onward submission to KEMSA. Under the arrangement, all communications and instructions with regards to GF procurements were supposed to be channeled through TNT.
- 235) The technical evaluation report was submitted to GF for pre-award review on 11th April, 2023. Following the review, GF made a decision to cancel the tender and to place the procurement of the nets under their pooled procurement mechanism on *wambo.org*.
- 236) Following the termination of the tender, KEMSA lost USD 455,589.04 in procurement fees.
- 237) The procurement under *wambo.org* had been completed, with the nets being allocated to two manufacturers. They were expected to be delivered in November, 2023, in time for the start of the mass campaign which was scheduled to take place from November, 2023 to January, 2024.

238) No other GF programs at KEMSA had been affected by the cancellation, and KEMSA was engaging with the GF country team to ensure adherence to its procurement procedures and guidelines, in order to avoid similar disputes in the future.

A copy of the written submissions by KEMSA has been attached hereto as Annex 14.

L) Submissions by the Global Fund Local Agent (PwC)

239) The Committee met with the Global Fund Local Agent (PwC) led by Mr. Francis Mbugua, Partner, Global Fund Local Agent Services, and their legal counsel, Mr. Peter Gachuhi, Kaplan and Stratton, at its sitting held on Tuesday, 25th July, 2023. A summary of their submissions is provided below.

240) Mr. Mbugua stated that the Global Fund (GF) financed Kenya in the fight against TB, HIV/AIDs and Malaria. Based in Geneva Switzerland, GF did not have an in-country presence and relied, in part, on Local Fund Agents (LFAs) to provide assurance on the implementation of its grants, in every country it supported.

241) He noted that as the Global Fund Local Agent, PwC had been contracted in Kenya to -

- a) Undertake objective assessments of the capacity of Principal Recipients and Subrecipients to implement Global Fund-financed program activities and manage grant funds, and
- b) Verify the Principal Recipient's progress towards programmatic objectives, use of grant funds and compliance with the relevant terms and conditions of the grant agreement between the Principal Recipient and the Global Fund.

242) He observed that as the local agent, PwC could not speak for or on behalf of the Global Fund, and further that the Global Fund was entitled to certain diplomatic privileges and immunities in Kenya.

243) The GF, with support from PwC, and in conjunction with The National Treasury, the Ministry of Health, KEMSA, and other assurance providers (Treasury Internal Audit, Office of Auditor General, among others), routinely assessed various risks that were likely to affect GF grant implementation with a view towards mitigating against risk. This was important because, if the risks were not mitigated against on a timely basis, future audits/reviews of the funds used could end up being declared ineligible, in which case the GF would request the country to refund the monies.

244) The National Treasury (TNT) was one of the Principal Recipients (PR) of Global Fund grants in Kenya, and was responsible for implementing GF grants on behalf of the Government of Kenya.

- 245) A major component of the Kenyan grants under TNT (approx. 77%) was the procurement of health products and health related items. For these grants, KEMSA was the designated procurement agent. TNT was responsible for working closely with the MoH to determine procurement needs.
- 246) To this end, the technical specifications of the LLINs were developed by the MoH in conformity with the World Health Organization Pesticide Evaluation Scheme (WHOPES) and WHO Pre-Qualification This was in line with the GF quality assurance guidelines and policies as expressed in the Guide to Global Fund Policies on Procurement and Supply Management of Health Products and Global Fund grant regulations.
- 247) Further, in line with what was agreed during grant-making, and the LLIN quantification report sent by MoH on 12th August 2022, Kenya requested for pyrethroid nets. The GF gave a go ahead on 2nd September 2022. Any changes to the approved specifications were expected to be discussed with the GF. Further, for GF funded procurements, MoH was expected to communicate with KEMSA through the PR (TNT).
- 248) Owing to the huge procurement budget, and some prior procurement irregularities at KEMSA, the procurement of health products was identified as a risk area. As a result, the GF introduced assurance measures, including pre-award reviews, which required the LFA to review procurement processes with a view towards mitigating the risk of procurement malpractices and allowing the GF PRs to continue working through KEMSA in a risk assured manner.
- 249) The objective of all pre-award reviews was to check compliance with Global Fund requirements for competitiveness, transparency/fairness, quality assurance, and cost-effectiveness, among other items, through -
- a) Adherence to the Grant Agreement (including the Global Fund Grant Regulations (2014), C19RM Guidelines, the Global Fund's codes of conduct, the Guide to Global Fund Policies on Procurement and Supply Management of Health Products, the Global Fund's Quality Assurance policies, and Quality Assurance notices; and
 - b) Adherence to applicable laws (such as the Public Procurement and Asset Disposal (PPAD) Act, Public Procurement and Asset Disposal Regulations and other relevant national legislation and regulations).
- 250) Regarding the various approval processes, procedures, guidelines and/or mandatory requirements of GF in relation to the procurement of the LLINs, he noted that the mass distribution of LLINs was a key intervention for Kenya as indicated in the Kenya Malaria Strategy (KMS) 2019–2023.

- 251) The quantities, types of LLINs to be bought, budget for funding etc, were determined during the grantmaking process led by the MoH (January to March 2021).
- 252) The final agreement and budget between the Government of Kenya and the GF was signed by TNT on behalf of the Government of Kenya and acknowledged by the Country Coordinating Mechanism ahead of the implementation period start date.
- 253) Prior to the tendering process, the Principal Recipient shared the technical specifications for review by the GF to ensure compliance. Following this, the Principal Recipient was required to ensure that the procurement process complied with the Grant Agreement and local applicable laws. Accordingly, on 13th March, 2023, GF requested TNT to submit the LLIN evaluation report for pre-award review pursuant to the terms of the Grant Agreement.
- 254) KEMSA was expected to undertake the procurement of the LLINs in line with the Kenya procurement laws and regulations, in addition to the relevant Global Fund guidelines and regulations.
- 255) KEMSA had undertaken many GF funded procurements in the past, and GF reviews had confirmed adherence to the laws/regulations and the grant agreement during those occasions e.g., the nets for the previous mass campaign in August 2019 and in February 2020. However, in instances where the laws/regulations and grant agreement had not been followed, the GF had not given clearance for those specific procurements to proceed.
- 256) For those health products for which the Global Fund determined that the recipient's procurement and/or supply management capacity was insufficient, the GF typically required a recipient to use: (i) the Pooled Procurement Mechanism (Wambo.org) or (ii) other established procurement and/or supply management agents or services acceptable to the GF.
- 257) On the circumstances that led to the cancellation of the tender at KEMSA, PwC submitted that on the request of GF, PwC undertook a routine pre-award review of the LLINs procurement whose product details were as listed below -

| No. | Procurement Package | No. | Estimated Budget | Products |
|-----|---|----------------------------------|------------------|--|
| | Supply of Long-Lasting Insecticidal Nets (LLINs, rectangular,(18 0x190x160cm) | GF ATM MAL NFM-2022/ 2023-OIT 02 | 9,557,111.00 | Polyethylene – LLINs, 4,285,700 pieces |
| | | | 13,222,341.23 | Polyester – LLINs, 5,929,301 pieces |

258) During the review, PwC made the following observations -

- a) MoH raised a requisition for procurement of LLINs on 18th October 2022. The request was received by TNT on 30th October 2022.
- b) The procurement request was received by KEMSA on 8th November 2022 from the TNT *vide* a letter dated 7th November 2022.
- c) The tender was launched on 31st January 2023, as an international open tender, with a bid deadline of 23rd February 2023. However, the process encountered a delay when KEMSA extended the bid deadline until 10th March 2023 following a written communication by the MOH State Department for Public Health and Professional Standards Office of the Principal Secretary, “citing inconsistency in specifications”.
- d) The TNT responded to KEMSA on 24th February 2023 that the technical specifications should remain as they were originally, given that they accurately reflected the intention to procure pyrethroid nets only and not PBO nets. The reasoning for this was primarily that pyrethroid nets were more cost-effective than PBO nets. Given that there was not enough budget to procure the full number of needed nets, it had been agreed by the PR, program and GF that the most responsible course of action was to maximize the number of nets within the funding envelope.
- e) The tender subsequently closed on 10th March 2023, with no changes to the tender document.
- f) The bid opening took place on 10th March 2023, with PwC in attendance. Seventeen (17) bids were registered as received on time, but it was identified during the bid opening that Bidders # 11 and # 17 were the same, reducing the list to 16 bids.
- g) The Tender Evaluation Committee (TEC) was appointed on 16th March, 2023, six (6) days after the bid opening had taken place, and submitted its report pre-award review on 6th April, 2023 which fell within the 30-day timeframe provided for in the PPAD Act.

259) With regards to the evaluation, PwC submitted that the GF review results agreed with the TEC for 11 bidders that did not meet the preliminary evaluation criteria.

260) However, for the five (5) bidders that were progressed to the technical evaluation stage by the Evaluation Committee, the Global Fund review yielded different results as demonstrated below:

| Bidder | Preliminary Evaluation | | Technical Evaluation I (Documentation 0) | | Technical Evaluation II (Sample Evaluation) | | Final Result | |
|---------------------------|------------------------|-----|---|-----|--|-----|--------------|-----|
| | TEC | LFA | TEC | LFA | TEC | LFA | TEC | LFA |
| Polyethylene LLINs | | | | | | | | |
| Bidder 1 | Y | N | Y | N/A | N | N/A | N | N |
| Bidder 2 | Y | N | Y | N/A | Y | N/A | Y | N |
| Bidder 7 | Y | Y | N | N | N/A | N/A | N | N |
| Bidder 8 | Y | N | N | N/A | N/A | N/A | N | N |
| Polyester Nets | | | | | | | | |
| Bidder 3 | Y | Y | N | N | N/A | N/A | N | N |
| Bidder 7 | Y | Y | N | N | N/A | N/A | N | N |
| Bidder 8 | Y | N | Y | N/A | Y | N/A | Y | N |

261) With regards to the preliminary evaluation, whereas the technical evaluation committee (TEC) assessed 11 out of the 16 bidders as non-responsive for not meeting mandatory requirements at the preliminary phase e.g. incomplete/noncontinuous (serialized) pagination, non-valid bid securities, and/or missing forms or signatures, the GF review confirmed the TEC's assessment that Bidders 4, 5, 6, 9, 10, 12, 13, 14, 15, 16, and 17 did not meet all the requirements to pass to the technical evaluation phase.

262) However, the review of the five (5) bids that the TEC had assessed as responsive did not yield the same result. As per the GF review, only Bidder 3 and Bidder 7 were responsive at the preliminary stage. Bidder 1, Bidder 2, and Bidder 8 should have been found unresponsive for the exact same reason why Bidder 4 had been found unresponsive – i.e., incomplete and/or noncontinuous pagination: The TEC comments for Bidder 4 were.... *"The bid documents were not paginated in a continuous ascending order from the first page to the last..."* Therefore, only Bidder 3 (for polyester nets) and Bidder 7 (for polyethylene and polyester nets) ought to have been considered for the next stage i.e., technical evaluation.

263) On the technical evaluation, PwC submitted that with regards to the polyethylene LLINs, their review found that the only Bidder that was responsive at the preliminary phase (Bidder No. 7), failed to meet requirements at the technical evaluation phase. As the TEC correctly noted, Bidder 7

provided a product that is not WHO pre-qualified and not registered with Pest Control Products Board (PCPB).

264) With regards to the polyester LLINs, their review found that the TEC incorrectly assessed Bidder 3 as non-responsive for not including a manufacturer's authorization. However, the bidder was a LLIN manufacturer, and the tender document had explicitly specified that this requirement was only applicable to bidders who were not manufacturers. Further, the TEC had not indicated the same for the other bidders who were manufacturers i.e. Bidder 1 and Bidder 2. Hence the inconsistency noted.

265) He further observed that the TEC assessed Bidder 8 as responsive, while the LFA/Global Fund review reached a conclusion of non-responsiveness. The review documented that Bidder 8 had submitted a sample that listed "PPP Holandi DMCC Dubai U.A.E" as the manufacturer, while the manufacturer authorization letter carried the heading of "Pak Poly Products Pvt. Ltd". Further, the Certificate of Conformity with ISO 9000:20021 - Cert. No. AQP-11122 – was also issued to PAK Poly Products (PVT) instead of PPP Holandi DMCC Dubai U.A.E. To note, the TEC had disqualified Bidder 3 earlier on the ground that the name on the sample was not 100% the same as the manufacturer's trading name (even though the difference in the case of Bidder 3 was far minor than in the case of Bidder 8 and other documentation established a direct link). Hence the inconsistency noted.

266) Based on the above, PwC submitted that the pre-award review yielded different results from the TEC evaluation with two bids that the TEC assessed as responsive (i.e. Bidder 2 and 8, failing to meet the mandatory documentation requirements in the preliminary phase.

267) Further, there were several instances where the evaluation was not done in line with the criteria stipulated in the tender document, PPAD Act, 2015 (revised edition 2022), PPAD Regulations 2020, and the Grant Agreement, and an overall failure to apply the evaluation criteria consistently to all bidders.

268) As a result, the GF made the decision to ask the TNT to move the procurement to the pooled procurement mechanism (wambo.org) for the following reasons:

- a) The fact that a new international open tender would need to be issued, which would take time;
- b) The noted gaps in the current procurement process;
- c) The urgency of obtaining LLINs that need to arrive in time for the launch of the next mass campaign in November 2023; and
- d) The need to complete the LLIN mass campaign by the end of the grant, 30 June 2024, after which any outstanding expenditure would not be able to be charged to the grant.

- 269) No meetings were called with KEMSA to discuss the exclusive agenda of the LLIN procurement: Rather, the decision to terminate the procurement process was communicated during one of its routine meetings with stakeholders.
- 270) Other issues and concerns by GF in relation to the management and operations of the Division of Malaria Control Program (DMCP) and MoH, included: weak and unstable leadership at the DMCP arising from lack of a substantive Head of Program from June, 2022, to July, 2023; financial management lapses; and, delays in undertaking preparatory works for the mass LLIN campaign. To this end, on 13th July, 2023, the MoH inaugurated a National Steering Committee to plan the mass LLIN campaign. And further, in order to improve on financial management at the program, TNT had posted three Finance Officers.
- 271) In relation to KEMSA, it was the submission of Pwc that GF relied on KEMSA procurement services under the current grant implementation period (NFM3: 1 July 2021- 30 June 2024). Specifically, KEMSA was responsible for procuring, warehousing, and distributing the HIV, TB, and malaria commodities funded by the Global Fund, to support the MOH disease programs and Kenyan patients.
- 272) GF had reviewed KEMSA operations regularly over the years, with varying results. For example, in 2018, a GF OIG audit found that, while there was room for improvement, *“the in-country procurement and supply chain systems and processes were “functional” and that KEMSA achieved better prices than the Global Fund Pooled Procurement Mechanism (PPM).*
- 273) However, following corruption allegations in 2020, and the withdrawal of US Government support from KEMSA, the MOH engaged with stakeholders, including development partners, to form the KEMSA Reforms Implementation Committee (KRIC) in February 2021.
- 274) The KRIC developed a plan to address the gaps in all critical functions of the organization, which was acknowledged for action and further development by a newly installed KEMSA Board in November 2021.
- 275) In March 2022, the GF OIG issued an audit report regarding KEMSA operations during the NFM2 grant implementation period (1 July 2018 – 30 June 2021) in which it highlighted (i) “inefficiencies”, bottlenecks”, and “irregularities” in procurement, as well as (ii) “ineffective controls at KEMSA’s warehousing and distribution systems.” The report put further pressure on KEMSA to pursue reforms.
- 276) In relation to the above, GF had put mechanisms and processes in place to enable close oversight over KEMSA procurements and delivery of Global Fund-funded products, with payment to health product suppliers being done by the TNT, upon submission of proof of completed service delivery, and contingent on satisfactory review of all the required documentation.

277) Key successes at KEMSA included -

- a) Overall success in the procurement and delivery of the health products under the GF grants, especially with regard to procurement of much needed medicines for HIV, TB, and malaria patients.
- b) Competitive prices for ARVs yielding over \$10 million in savings in the first year of grant implementation alone, which enabled the procurement of more ARVs in Year 2. For example, the savings through KEMSA had enabled the GF to double the number of packs of TLD-90 in Year 2 from 1.5 million to 3 million packs. The realized savings were adequate to cover the needs of all the adult HIV patients on TLD for 7 months. Material savings had also been realized in the procurement of antimalarials and antituberculosis meds.
- c) Last mile distribution.
- d) Robust procurement reference framework with KEMSA procurement of GF-funded products being grounded in the national legal framework for public procurement and for assets disposal by public entities – i.e., Public Procurement and Asset Disposal (PPAD) Act, 2015 (revised edition 2022) and The Public Procurement and Asset Disposal Regulations, 2020 (PPAD Regulations, revised edition 2020).
- e) Adequate checks and balances, with KEMSA's procurement process involving a host of stakeholders, such as the MOH, the national disease programs, TNT, KEMSA, LFA, and the GF. This helped ensure the right commodities were procured in the correct amounts, and in a manner that ensured value for money and adherence to all relevant policies.

278) Key weaknesses at the Authority included -

- a) Leadership instability with frequent changes of the CEOs, senior management and board of directors;
- b) Complex, long and often delayed procurement processes;
- c) Delayed payments to suppliers, particularly in counterpart funding owing to unavailability of funds; and
- d) Poor processing of import permits, tax exemptions and other duties for GF-funded procurements.

*A copy of the written submissions by PwC has been attached hereto as **Annex 15**.*

M) Submissions by the Principal Secretary, The National Treasury

- 279) The Committee met with Dr. Chris Kiptoo, Principal Secretary, The National Treasury, during its sitting held on Wednesday, 12th July, 2023. A summary of their submissions is provided below.
- 280) He stated that the Global Fund (GF) was a financing mechanism that sought to rapidly raise and disburse funding for strategic programs that reduce the impact of HIV/AIDS, TB and Malaria on low- and middle-income countries. To this extent, it had mobilized and invested more than US\$4 billion per annum to support programs run by local experts in more than 100 countries.
- 281) Kenya had benefited from Global Fund grants since its inception in the year 2002. To date, GF had signed grants with Kenya worth USD 2.0 billion, committed USD 1.69 billion and so far, disbursed USD 1.67 billion.
- 282) In-country structures involved in the implementation of GF grants as summarized below -

| | Structure | Responsibility |
|---|---|---|
| 1 | Kenya Coordinating Mechanism (KCM) | <ul style="list-style-type: none"> A country-level public-private partnership structure. Its role is to coordinate the development of grant applications, nominate Principal Recipients (PRs) in conformity with GF dual-track funding policy, and provide oversight during implementation of grants; among others |
| 2 | Local Fund Agent (LFA) – PricewaterhouseCoopers | <ul style="list-style-type: none"> Engaged by GF to provide oversight, verification and/or reporting services to the Global Fund concerning Program implementation in Kenya. |
| 3 | Principal Recipients (PRs) | <ul style="list-style-type: none"> In-country institutions that are legally responsible for programme results and financial accountability in accordance with the Grant Agreement Responsible for management of Global Fund grants, including disbursement of funds to SRs, performance monitoring and reporting. Current PRs for Grant implementation period 2021 – 2024: <ul style="list-style-type: none"> The National Treasury & Economic Planning (HIV, TB, Malaria & RSSH grants) |

| | | |
|---|--|--|
| | | <ul style="list-style-type: none"> o Amref Health Africa in Kenya (TB and Malaria grants) o Kenya Red Cross Society (HIV grant) |
| 4 | Sub-Recipients (SRs) | <ul style="list-style-type: none"> ▪ Implementers of grant activities, including activity and financial reporting to PRs ▪ Current SRs for The National Treasury & Economic Planning grants <ul style="list-style-type: none"> o National AIDS & Sexually Transmitted Diseases Program (NASCOP), MOH o National TB Program (NTP), MOH o National Malaria Control Program (NMCP), MOH o National AIDS Control Council (NACC), o Health Systems Strengthening Department (HSSD), MOH |
| 5 | Kenya Medical Supplies Authority (KEMSA) | <ul style="list-style-type: none"> ▪ Procurement agent for program commodities in line with a Memorandum of Understanding (MOU) / Memorandum of Administration (MOA) between KEMSA and The National Treasury |
| 6 | Health Sector Working Groups (HSWG) – HIV, TB, Malaria & HSS | <ul style="list-style-type: none"> a) Provide sector-wide technical leadership for disease control |

283) Regarding evidence of written documentation to KEMSA specifying that the LLINs to be purchased under the GF grant were to be WHOPEs recommended pyrethroid LLINs during the pre-tendering stage, he submitted that documentation was submitted by the Principal Secretary, Ministry of Health to the Principal Secretary, National Treasury *vide* letter, Ref. No. MOH/ADM/1/1/2, dated 18th October, 2022. The same was communicated to the Chief Executive Office, Kenya Medical Supplies Authority (KEMSA) by the Global Fund Coordinator through letter No. EA/FA/240/119/'D' / (3) dated 7th November, 2022.

284) With regards to how Global Fund arrived at the decision to supply World Health Organization Pesticide Evaluation Scheme (WHOPEs) recommended pyrethroid Long Lasting Insecticidal Nets (LLINs), he submitted that the

decision by GF was largely driven by cost and effectiveness factors, and noted that pyrethroid only treated nets were less costly than Pyrethroid-Piperonyl Butoxide (PBO) nets. He further stated that PBO nets were less wash resistant than pyrethroid only nets.

285) On the fate of the counties that were supposed to use Pyrethroid-Piperonyl Butoxide (PBO) treated nets owing to pyrethroid resistance in their region e.g. Bungoma and Vihiga, he stated that they would be fully covered by the President's Malaria Initiative (PMI)/USAID as initially planned.

286) He further confirmed that the procurement of the polyester Pyrethroid-Piperonyl Butoxide (PBO) and polyethylene Pyrethroid-Piperonyl Butoxide (PBO) Long Lasting Insecticidal Nets (LLINs) under the US President's Malaria Initiative (PMI) had commenced, with delivery of the LLINs expected to start in October 2023 in readiness for distribution by PMI.

287) He further noted that KEMSA, on behalf of the Government of Kenya (Global Fund Malaria Program; KEN-M-TNT), invited tenders for the supply of Long-Lasting Insecticidal Nets (LLIN).

288) Part 6 of the invitation to tender clearly set out that complete serialized/paginated bidding documents shall be submitted accompanied with a signed declaration of the number of pages. This was in accordance with section 74 of the PPDA 2015. Consequently, he stated that it was in order to reject those bids that did not comply with this requirement as mandated under section 75 of the regulation.

289) He stated that based on the Global Fund review, there were several instances where the LLIN tender evaluation was not done in line with the criteria stipulated in the tender document, the Sections 80 and 86 of PPAD Act, 2015 (revised edition 2022), and GF guidance.

290) He noted that the Global Fund guidelines on Procurement and Supply Management of Health products provided that: *"For those health products for which the Global Fund determines that the recipient's procurement and/or supply management capacity is insufficient, the Global Fund may, in its sole discretion, require a recipient to use the Pooled Procurement Mechanism"*. As such, following the move to procure through WAMBO, the Global Fund became the procuring entity.

291) He further submitted that the decision by GF to move the procurement to wambo.org with immediate effect was informed by the following reasons -

- a) The fact that a new international open tender would need to be issued, which would take time;
- b) The noted gaps in the current procurement process;

c) The urgency of obtaining LLINs that need to arrive in time for the launch of the next mass campaign in November 2023; and

d) The need to complete the LLIN mass campaign by the end of the grant, 30 June 2024.

292) He submitted that two manufacturers had been awarded the contract to supply the polyethylene and polyester nets to Kenya under the Global Fund Pooled Procurement Mechanisms were Global Fund prequalified suppliers as provided below -

| | Manufacturer | Manufacturing site | Eligibility Criteria | Specifications |
|---|---|--|---|--|
| 1 | A to Z Textiles Mills Ltd | A to Z Textile Mills Limited, Plot No 698, P.O Box 945 , Off Dodoma Road, Net World Area, Kisongo Arusha (Tanzania) | WHOPES Recommendation - PQ Converted. WHO PQ ref. 009-001 | WHO specification 454/LN/3 (August 2015) |
| 2 | Tianjin Yorkool International Trading Co. Ltd | Tianjin Yorkool International Trading Co.Ltd, Sangyuan Industrial Zone, Baoding City, Lixian County, Hebei Province, China Tianjin Yorkool International Trading Co., Shiyu South Road, Kuoda Village, Nanmeng Township, Bazhou City, Hebei Province, China Tianjin Yorkool International Trading Co., The Wind Road South Middle, Gaotang County Economic Development Zone, Liaocheng City , Shandong Province, China Sino Africa Medical Devices Co. Ltd Plot 27-31 , Second Ring Road , Luzira Industrial | WHO PQ ref. 021- 003 | WHO specification 333+33/LN/2 (NETTING) (January 2019) |

| | | | | |
|--|--|---|--|--|
| | | Park P.O Box 7321 , Kampala , Uganda | | |
|--|--|---|--|--|

293) He further submitted that the two manufacturers were part of the initial 17 bidders (*as shown below*) in the KEMSA tender no. GF ATM MAL NFM-2022/2023 OIT-02 for the supply of long lasting insecticidal nets (LLINS).

| # | Bidder Name |
|----|---|
| 1 | V.K.A Polymers Pvt. Ltd |
| 2 | Shobikaa Impex Private Limited |
| 3 | Tianjin Yorkool International Trading Co. Ltd |
| 4 | Vestergaard Sarl |
| 5 | Medsun Limited |
| 6 | A To Z Textile Mills Ltd |
| 7 | Premium Movers Limited |
| 8 | Partec East Africa Limited |
| 9 | Bilidola Services |
| 10 | Lanmax Solutions Limited |
| 11 | Apicalmed Limited |
| 12 | Mtoria Agency |
| 13 | Patanha Enterprises |
| 14 | Globeco East Africa Limited |
| 15 | Winnsur General Supplies Company Limited |
| 16 | Togi Investments (K) Limited |
| 17 | Home Fix Limited |

294) He noted that payments to the two suppliers would be done in USD as per the engagements between WAMBO and the suppliers. Noting that the GF pooled procurement, WAMBO is run by the Global Fund Country team based in Geneva, he stated that the funds for the LLIN costs would not be disbursed

to the National Treasury as would have been the case if the procurement was done by KEMSA. The Tender amount was USD 24,091,141.99.

- 295) With regards to whether due diligence had been carried out on the two successful bidders under the Global Fund Pooled Mechanisms website (wambo.org), he submitted that following the move to procure the LLINs through the Global Fund Pooled Mechanism, due diligence is left to the Global Fund Country Team in Geneva.
- 296) On what issues/challenges had arisen between the National Treasury as a Global Fund Principal Recipient, and the Ministry of Health as a sub-recipient, he submitted that bureaucracies in the Ministry of Health had been slowing down and affecting the implementation of Global Fund activities and procurement. Key challenges included -
- a) Delays in the approval of work plans;
 - b) Delays in submitting of procurement requests to TNT for review and onward submission to KEMSA;
 - c) Frequent changes in the management of Global Fund implementing programs (Directors, Program Heads, Program Managers etc); and
 - d) Failure to use the required communication channels.
- 297) He concluded his submissions by noting that the GF Program Management Unit (PMU) at the NT had a staff complement of twenty-two (22) officers working under different employment terms, namely: (a) GoK, permanent and pensionable (13), and (b) fixed-term contracts defined within grant implementation periods (9).
- 298) He noted that though Global Fund grants were implemented within the government systems, the overall mandate of PMU called for a mix of competencies found from both within and outside the mainstream human resource establishment in the public sector. The background of the professionals in the PMU included, Health, Management, Economics, Finance and Accounts, Audit, Supply Chain & Management, ICT and Support.
- 299) In response to concerns regarding corruption and potential conflict of interest by GF, considering the manner in which it had communicated its decision to terminate the tender (i.e. at a meeting with no prior minutes and no records), and the subsequent award of the tender to two bidders who had not qualified under the KEMSA process, the Dr. Kiptoo submitted that GF had lost confidence in KEMSA's procurement process and therefore had the right to withdraw its funds.
- 300) In this regard, he cited examples of other donors like USAID which were conducting procurement outside government channels. He further stated that the reason GF found no responsive bidders under the KEMSA tender

evaluation process was because of the lack of uniform application of the evaluation criteria to all bidders, thus rendering the entire process flawed.

- 301) Regarding concerns raised regarding direct communication by GF with officers at the NT and the MoH, and the use of personal emails on the same, Dr. Kiptoo committed to streamline communication processes at the GF Management Unit. He further called on the Committee to intervene on the issue of use of official email addresses across government, noting that the current service was unreliable and inconsistent.

*A copy of the written submissions by the Principal Secretary, The National Treasury, has been attached hereto as **Annex 16**.*

N) Submissions by the Cabinet Secretary, Ministry of Health

- 302) The Committee met with Hon. Susan Nakhumincha, Cabinet Secretary, Ministry of Health, during its sitting held on Friday, 28th July, 2023. A summary of her submissions is provided below.

- 303) The MoH had taken to address the alleged irregularities in the procurement of LLINs at KEMSA as follows -

- a) Instituted governance reforms through the reconstitution of the KEMSA Board of Directors;
- b) Reorganization of the National Malaria Control Program, including replacement of the Head of Program, and redeployment of staff;
- c) An ongoing assessment of KEMSA's capacity to procure health products and technologies;
- d) Transfer of officers who were implicated in the GF Audit Report, and those who participated in the bungled procurement;
- e) Secondment of five (5) supply chain management officers to KEMSA; and
- f) Invitation of EACC to investigate the allegations and make recommendations for necessary action by the ministry.

- 304) With regards to details of an alleged formal directive from her person to Ms. Terry Ramadhani, CEO on suspension at KEMSA, that she was only to communicate with a specific Principal Secretary, to the exclusion of the other, it was her testimony that on 21st February, 2023, Ms. Ramadhani wrote to the Principal Secretary, State Department for Public Health and Professional Standards, requesting to reallocate funds from AIEs issued by the MoH.

- 305) On 22nd March, 2023 Ms. Ramadhani wrote to her seeking clarification and formal guidance regarding approval processes for the utilization of funds held

at KEMSA for services under the State Department for Public Health and Professional Standards.

- 306) The AIE in question emanated from the MoH under Vote 1081, for which the appointed Accounting Officer was the Principal Secretary, State Department for Medical Services. As such, the request by the CEO, KEMSA dated 21st February, 2023, for the reallocation of funds ought to have been directed to the relevant PS. The directive was therefore for Ms. Ramadhani to adhere to the proper channels of communication.
- 307) With regards to changes in the constitution of the Board of KEMSA, including clarity on the constitution and functionality of the Board of KEMSA at the time of the procurement of the LLINs, she submitted as follows -
- a) HE The President appointed Hon. Daniel Rono to be Chairperson, KEMSA, w.e.f. 10th February, 2023. This revoked the appointment of Mary Chao Mwadime of April, 2021.
 - b) Following the allegations of irregularities in the procurement of the LLINs, HE The President revoked Hon. Rono's appointment, and appointed Mr. Irungu Nyakera as the Chairperson on 15th May, 2023.
 - c) FCPA Hezbon Oyieko Omollo, Mr. Bernard Kipkirui Bett Dr. Jane Masiga Jane Nyagaturi Mbatia were likewise appointed on 15th May, 2023, with the revocation of the membership of Wato Doko, John Konchellah and Mercy Cherongis.
 - d) Previous members of the Board, included, Kenneth Wabwire Akide and Reema Doshi-Lewis who were appointed w.e.f 18th march, 2022; and, Capt. (Rtd) Lawrence Wahome, Robert Nyarango, Terry Kiunge Ramadhani and Linton Nyaga Kinyua who were appointed w.e.f. 30th April, 2021.
- 308) Following the cancellation of the LLIN tender funded by GF, Ms. Terry Ramadhani was requested to step aside to allow for investigations. This was in line with the KEMSA Human Resources and Administration Policies and Procedure Manual.
- 309) Dr. Andrew Mutava Mulwa was appointed as the Ag. CEO, KEMSA, in accordance with the Circular, Ref. No. OP/CAB.9/AA, dated 1st February, 2023, on the Appointment of Acting Chief Executive Officers and Alternate Representatives to Boards of State Corporations. The circular provided guidance for Boards in instances where they were unable to source an acting replacement within the agency.
- 310) In relation to the above, she observed that the Board consulted with her office to select a suitable officer from the line ministry to be seconded and then appointed by the Board. Dr. Mulwa was selected for appointment, and subsequently appointed by the Board as the Ag. CEO.

- 311) In order to ensure the autonomy of KEMSA and to strengthen its governance structures, the MoH had acted to appoint its Board of Directors, and to give it an independent budget to carry out its mandate.
- 312) Regarding allegations made by Ms. Terry Ramadhani, CEO in suspension at KEMSA, that KEMSA had struggled to maintain its independence owing to undue interference from her office, the CS responded that Ms. Ramadhani had never brought the allegations to her attention.
- 313) Regarding an allegation by Ms. Ramadhani that on 22nd March, 2023, she received a note from the CS asking her to assist a certain Mr. Ken Ogolla ‘accordingly’, it was her testimony that she worked for the public good, and routinely interacted with the CEOs of all the bodies at MoH.
- 314) She confirmed that Mr. Ogolla had visited her office in relation to a security tender, and that she referred him to the then CEO. She clarified that the note was written for purposes of ensuring proper documentation. This had followed various previous attempts by persons to defraud SAGAs in her name. She further cited her 20 year’s experience as a health supply chain practitioner in the Kenyan pharmaceutical market as a reason she felt justified to intervene when she noted that KEMSA was facing challenges.
- 315) She committed to address emerging concerns regarding the apparent lack of proper documentation and record-keeping at the MoH, and the use of personal emails by officers at the MoH and KEMSA in consequential communication with members of the GF team.

A copy of the written submissions by the MoH has been attached hereto as Annex 17.

CHAPTER FIVE

COMMITTEE OBSERVATIONS

316) The Committee made the following observations -

A) *The Legal Framework*

1. The Committee observed that the Public Procurement and Asset Disposal Act, 2015 is the primary law for public procurement in Kenya. Indeed, Section 5(1) of the Act states that the Act prevails in case of any inconsistency between it and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal. The Public Procurement and Asset Disposal Act was, however, not wholly applicable to the present procurement process.
2. The Global Fund to Fight AIDS, Tuberculosis and Malaria (the Global Fund) entered into an agreement (Grant Confirmation) with the National Treasury (Principal Recipient) on behalf of the republic of Kenya (Grantee) with the objective to reduce malaria incidence and deaths by at least seventy-five percent of the 2016 levels by 2023, working towards a malaria free Kenya. The agreement was executed and became effective on 14th June, 2021.
3. The Grant Confirmation mandated the National Treasury to comply with the Global Fund Guidelines for Grant Budgeting (2019, as amended from time to time), the health products Guide (2018, as amended from time to time) and any other policies, procedures, regulations and guidelines which the Global fund would communicate in writing to the Republic of Kenya and the National Treasury from time to time (*Annex 18*).
4. In this respect, the National treasury had on 22nd February, 2019 entered into a Memorandum of understanding with the Kenya Medical Supplies Authority (KEMSA) commencing 1st September, 2017 and ending on 31st August, 2021. Vide the Memorandum of Understanding, the National Treasury appointed the Kenya Medical Supplies Authority to perform the procurement and supply chain management services under the Global Fund to Fight AIDS, TB and Malaria funded programs in Kenya (*Annex 19*).
5. The Memorandum of Understanding required KEMSA to ensure that procurement and supply chain management activities under the Global Fund are conducted in conformity with the Public Procurement and Asset Disposal Act, 2015 and the Guide to Global Fund Procurement and Supply Management of Health Products as revised from time to time (*Annex 20*). The Memorandum of Understanding further provides that it would be interpreted exclusively in accordance with the laws of the Republic of Kenya.

6. The present procurement process therefore required adherence to not only the Public Procurement and Asset Disposal Act but also the Global Fund Guidelines for Grant Budgeting (2019, as amended from time to time), the Health Products Guide (2018, as amended from time to time) and any other policies, procedures, regulations and guidelines which the Global Fund would communicate in writing to the Republic of Kenya and the National Treasury from time to time. This requirement creates a bit of a quagmire.
7. Section 89 of the Public Procurement and Asset Disposal Act makes provision for International tendering and competition. It however does not contemplate a situation where the guidelines, or even the law, of a jurisdiction outside Kenya being applicable to a procurement by a Kenyan public entity. Indeed, the entirety of the Public Procurement and Asset Disposal Act doesn't contemplate qualification by a law from a different jurisdiction.
8. It was however instructive to note that the present procurement process was as a result of a grant by The Global Fund. Being the entity funding the project, it is not unreasonable for The Global Fund to require compliance with its guidelines and policies. Indeed, The Global Fund did not have to require compliance with Kenyan law, to wit the Public Procurement and Asset Disposal Act in the procurement process.
9. The Guidelines and Policies of The Global Fund however required that, among others, the procurement be subjected to their approval before awarding the qualified bidder. This is contrary to the provisions of the Public Procurement and Asset Disposal Act which does not make provision for the supervision of the procurement process by a third party.
10. This indicated a lacuna in the Public Procurement and Asset Disposal Act for this kind of procurement. There was therefore an urgent need for the Act to be amended to make clear provision for these kinds of instances to ensure that an external funding party can rely on the Act and still require adherence to its own policies and guidelines.

B) In regards to the tender specifications

11. On behalf of the user department, Ministry of Health, Dr. Ahmeddin Omar, Ag. Head, Division of National Malaria Programme, developed specifications which were issued to the procuring agent i.e. KEMSA for procurement of the nets, the specifications had two requirements for the nets under table No. 7 Insecticide Impregnation – Technology requirements as follows -
 - a. Treated with WHOPES recommended insecticide (see link to their website ...) incorporated/coated into netting material to

ensure wash resistance of the insecticide for at least 20 washes;
and

b. Synergist Piperonyl Butoxide (PBO) LLINs – Combination nets.

12. The Committee observed that the specifications issued by the Ministry of Health, which was the user department, included the requirement of both WHOPES and “Synergist Piperonyl Butoxide (PBO) LLINs – Combination nets” (*Annex 21*).
13. To note, the Committee did not find evidence to suggest that the Ministry of Health was involved in the final decision by the Global Fund to advertise for the WHOPES pyrethroid LLINs. This suggests that despite being the user department, the Ministry did not have the final say in the matter, and that it was a unilateral decision by the Global Fund Management Unit at the National Treasury.
14. The Committee nevertheless took note that it had been the conclusion of Public Procurement Regulatory Authority (PPRA), that the specifications for WHOPES recommended insecticide (pyrethroid) LLINs, and synergist Piperonyl Butoxide (PBO) - *combination nets could not be used in one tender, and that the user department ought to have submitted one specification...based on previous experience with Global Fund.*
15. Further, the Committee observed that many local suppliers were constructively shut out of the tender owing to the imposition of tender specifications that favored international manufacturers (*Annex 22*).

C) In regards to the extension of the tender

16. The extension of the tender was rendered suspect based on the following
 - i) The sequence of events leading to the extension appeared solicited and mischievous as evidenced by the following -
 - The tender was advertised on 31st January, 2023, with tender opening scheduled for 23rd February, 2023 (*Annex 23*);
 - On 20th Feb, 2023, just two days to the close of the tender, Dr. Omar submitted a memo querying the omission of PBO technical specification (*Annex 24*);
 - On 21st February, 2023, *vide* a letter, Ref. MOH/ADM/1/1/2, Dr. Mburu, former PS, wrote to the then CEO, KEMSA, informing her of the alleged technical inconsistency;
 - On 22nd February, 2023, Dr. Ramadhani wrote to the GF

PR informing them of a decision to extend the tender to 10th March, 2023 (*Annex 25*);

- On 23rd February, 2023, the tender extension was published in Standard and Daily Nation newspapers, KEMSA website and PPIP portal (*Annex 26*). (*A copy of internal communication within KEMSA in relation to the tender extension is attached under Annex 27*); and
- On 28th February, 2023, Dr. Ahmeddin Omar, Ag. Head, Division of National Malaria Program, sent a memo to Dr. Mulwa, then Ag. Director Medical Services/Preventive and Promotive Health, affirming the specifications of the LLINs as tendered (*Annex 28*).

ii) Improper use of communication channels as evidenced by -

- Lack of evidence that Dr. Omar's memo followed the proper channels from his office, through his supervisor the Head, National Strategic Public Health Programs, to then Ag. Director of Medical Services, Preventive and Promotive Health, and onward to the PS's office. Further, the memo did not contain any stamps indicating which offices it had been received in, and on what dates;
- The memo referenced an attached letter to the Principal Secretary asking KEMSA to 'rectify the error'. However, whereas Dr. Omar was unable to produce a copy of the attached letter, the substance of a subsequent letter by the Principal Secretary, State Department of Public Health and Professional Standards, to KEMSA, in which she communicated an inconsistency in the technical specifications, was identical to the substance of the memo;
- The letter to KEMSA by the then Principal Secretary in which she sought clarification on the type of nets to be procured was misguided, as it ought to have been directed to the NT as the Principal Recipients;
- The decision by the former CEO, KEMSA to extend the tender based on Dr. Mburu's letter, despite KEMSAs' primary role as the procuring agency for the GF Principal Recipient. Based on the MOU executed between KEMSA and TNT as the GF Principal Recipient, the decision to extend the tender ought to have been made in consultation with the TNT first.

17. In regard to the clarification sought on the tender specifications by Dr. Josephine Mburu, former Principal Secretary, State Department of

Public Health and Professional Standards, it was the considered opinion of the Committee that she acted in good faith based on the information that was availed to her by the technical officers.

18. Further, in light of the circumstances, the Committee observed that the extension of the tender was a necessary operational decision by Ms. Terry Ramadhani, then CEO, given the seeming urgency of the matter at the time.
19. It was further the opinion of the Committee that the extension of the tender did not have any material impact on the tender as the tendering process proceeded regardless.

D) In regards to the tender evaluation by KEMSA

20. The Committee noted that the Tender Evaluation Committee comprising officers from the Ministry of Health and KEMSA was appointed on 16th March, 2023, with the tender evaluation process being conducted on 23rd and 24th March, 2023. Following the conclusion of the evaluation process, the bid evaluation report was signed on 28th March, 2023.
21. Both PPRA and GF established inconsistencies with the tender evaluation as evidenced by the following -

- a) According to an audit by PPRA, only two bidders passed the preliminary evaluation and qualified to proceed to the technical evaluation i.e. Bidder No. 3 - Tianjin Yorkool International Trading Co. Ltd, and Bidder No. 7 - Premium Movers Limited.

However, the tender evaluation committee declared five (5) bidders as follows: VKA Polymers PVT Ltd, Shobikaa Impex Private Ltd, Tianjin Yorkool International Trading Company, Premium Movers Ltd, Partec East Africa Limited; and

- b) A review of the evaluation report by Global Fund indicated various areas of non - compliance on the evaluation of the tender. The PPRA audit team concurred with the Global Fund findings.

22. The Committee further noted that the PPRA audit team had established that the tender evaluation committee had failed to evaluate the tender in compliance with the provisions of Section 80(2) of the Act.
23. The above notwithstanding, the Committee noted that there were serious breaches in protocol with regards to how feedback on the tender evaluation was communicated both within the Government, and between the different agencies and GF itself: For instance, the Committee found that the KEMSA Bid Evaluation Report was sent directly to Global Fund representatives by an officer, bypassing established government communication channels (*Annex 29*).

Further, the Global Fund's Pre-Award Review findings and subsequent decision to cancel the tender in favor of its agency *Wambo.org* were communicated to KEMSA during an April 2023 visit. This communication occurred without prior notice, during what was described as a routine visit, where the Global Fund informed the KEMSA Board and management of its decision.

E) In regards to the cancellation of the tender

24. The Committee observed that following the termination of the tender, while there was no apparent loss of public funds, KEMSA lost USD 455,589.04 (approximately Kshs. 70 million) in procurement fees.
25. The Committee observed that the cancellation of the tender appeared to have been influenced by the Global Fund's apparent effort to exert significant control over the procurement process from beginning to end. This included the GF team based in Geneva, Switzerland, making multiple trips to Nairobi, Kenya, at least three times during the relevant period, raising concerns about the autonomy and the ability of local government agencies to make independent decisions.
26. Nonetheless, the Committee took note that prior to the cancellation of the tender, GF raised concerns regarding serious governance and financial management gaps at the National Malaria Program, and had recommended, amongst others, the redeployment of officers alleged to be participating in prohibited practices. Members observed that the concerns expressed by GF regarding governance issues and financial impropriety at the MoH may have played a contributory role in the decision by GF to terminate the tender process at KEMSA (*Annex 30*).

F) In regards to the tender award

27. The Committee observed that two manufacturers were awarded the contract to supply the polyethylene and polyester nets to Kenya under the Global Fund Pooled Procurement Mechanism (*wambo.org*) as provided below -

| | Manufacturer | Manufacturing site | Eligibility Criteria | Specifications |
|---|---------------------------|---|---|--|
| 1 | A to Z Textiles Mills Ltd | A to Z Textile Mills Limited, Plot No 698, P.O Box 945 , Off Dodoma Road, Net World Area, Kisongo Arusha (Tanzania) | WHOPES Recommendation - PQ Converted. WHO PQ ref. 009-001 | WHO specification 454/LN/3 (August 2015) |

| | | | | |
|---|---|---|----------------------|---|
| 2 | Tianjin Yorkool International Trading Co. Ltd | <p>Tianjin Yorkool International Trading Co.Ltd, Sangyuan Industrial Zone, Baoding City,.Lixian County, Hebei Province, China</p> <p>Tianjin Yorkool International Trading Co.,Shiyou South Road, Kuoda Village, Nanmeng Township, Bazhou City, Hebei Province, China</p> <p>Tianjin Yorkool International Trading Co., The Wind Road South Middle, Gaotang County Economic Development Zone, Liaocheng City , Shandong Province, China</p> <p>Sino Africa Medical Devices Co. Ltd Plot 27-31 , Second Ring Road , Luzira Industrial Park P.O Box 7321 , Kampala , Uganda</p> | WHO PQ ref. 021- 003 | WHO specification 333+33/LN/ 2 (NETTING) (January 2019) |
|---|---|---|----------------------|---|

To note, the two manufacturers were part of the initial 17 bidders who failed to go through in the initial tender by KEMSA (Tender No. GF ATM MAL NFM-2022/2023 OIT-02) for the supply of the LLINS.

28. Based on the foregoing, the Committee observed that GF appeared to have funded the project, and then proceeded to dictate what the Ministry could buy and from whom. In the case of the LLINs, Members noted that the MoH appeared to have been reduced to a mere conduit for business.
29. In addition, the Committee took note of allegations linking certain PwC officer(s), acting as the Global Fund Local Agent (GFLA), with Tianjin Yorkool International Trading Co. Ltd which ultimately won the tender. While the Committee did not set out to substantiate these allegations during the course of this investigation, it noted that the advisory role by

the GFLA in the tender cancellation raised concerns about potential interference with the tendering process, and warranted further investigation by relevant investigatory agencies due to possible collusion and conflict of interest.

G) In regards to the structure and organization of Global Fund operations in Kenya

30. Further, the Committee observed that the MoH appeared to have been reduced to a mere bystander in the implementation of the program, with National Treasury as the Principal Recipient taking center stage: As structured, Members noted that officers attached to the Global Fund Management Unit (GFMU) at the National Treasury appeared to have precedence over even the Cabinet Secretary and the Principal Secretary of the MoH in programs relating to Global Fund.
31. The Committee noted with concern, evidence to suggest that the program was creating impunity and weakening governance and institutional structures in the country: For instance, Members noted that with regards to the LLINs grant, Global Fund engaged directly with MoH program and technical officers without reference to the existing line structures, including the offices of the Cabinet Secretary and the Principal Secretary. To this extent, it appeared that officers were making decisions on behalf of the Government despite lacking the necessary mandate.
32. Members also noted with concern, the apparent lack of communication protocol and guidelines between the GF team, and officers at the TNT and the MoH, and further took note of the use of personal emails in most communications.

In relation to the above, the Committee noted that the Funds' mode of communication and convoluted reporting structure had led to miscommunication, confusion and the creation of silos at strategic public health programs like malaria control.

33. To note, during the course of its investigations, the Committee found that the contracts of some of the officers attached to the GFMU at TNT had lapsed. However, despite their contracts lapsing, the officers remained in their positions and continued to provide services, contrary to public service procedures.
34. Noting that the cancellation of the tender by GF had serious implications on the reputation and image of Kenya abroad, the Committee observed the need for clear processes and procedures for the termination of donor-funded projects in alignment with Kenya's public procurement laws. Defining these protocols was necessary to safeguard against reputational risks to the country, and to ensure mutual transparency and accountability in projects by donors.

35. Further to the above, the Committee noted that there was a need to review diplomatic immunity granted to international organizations operating within Kenya, particularly in cases where conflict of interest, collusion, or corruption is suspected.

H) Miscellaneous

36. The Committee observed that key challenges that had contributed to the governance concerns that arose in relation to the tender were related to the lack of substantive holders of office in the National Malaria Program at the MoH, and the frequent redeployment of officers.

CHAPTER SIX

COMMITTEE RECOMMENDATIONS

317) Based on the foregoing, the Committee made the following recommendations-

1. The Senate to amend the Public Procurement and Asset Disposal Act -
 - a) to clarify processes involving third party entities and donors in public procurement.
 - b) provide for the automatic disqualification of any company that fails a national tender evaluation process in a donor-funded program from consideration by the donor to minimize potential abuse and/or collusion.
 - c) provide for the prioritization of locally manufactured goods in both public and donor-driven procurements where applicable.
2. The Cabinet Secretary, Ministry of Health-
 - a) ensures the **immediate** redeployment of all officers in the National Malaria Control Program at the Ministry of Health, and the application of necessary administrative/disciplinary processes of the said officers where applicable.
 - b) acts in line with section 34(3) of the Public Service Act, 2017, which states that public officers can only serve in acting capacity for one (1) month and up to a maximum of six (6) months, the Ministry of Health in collaboration with the Public Service Commission (PSC) act to competitively fill all vacant positions within its approved structure within a period of **12 months** from the tabling of this report.
 - c) establishes a standing committee within the Ministry of Health to periodically review and publish standards and specifications for health products and technologies in the country with **immediate** effect.
 - d) applies to the National Treasury for KEMSA to receive its own direct Vote Head for operational autonomy within **three (3) months** from the tabling of this report.
3. The Office of the Prime Cabinet Secretary to review the structural relationship between the Government of Kenya and the Global Fund to prioritize user departments, in this case, the Ministry of Health, as the principal rather than subsidiary recipients in programs related to their mandate within a period of **six (6) months** from the tabling of this report.

4. The Cabinet Secretary, Ministry of National Treasury and Planning to disband the Global Fund Management Unit at the National Treasury, and provide for the full transfer of its responsibilities and functions to the Ministry of Health with **immediate** effect.
5. The Head of Public Service to issue communication protocols and guidelines for adherence across government agencies within a period of **three (3) months** from the tabling of this report.
6. The Cabinet Secretary, Ministry of ICT to ensure that all government communication is relayed through official communication channels within a period of **three (3) months** from the tabling of this report.
7. The Board and management of KEMSA to ensure the automation of all procurement processes at KEMSA to increase efficiencies, and minimize human error within a period of **six (6) months** from the tabling of this report.

This report be dispatched to the Head of Public Service, the Ministry of Health, the National Treasury, the Ministry of ICT and KEMSA for purposes of implementing its recommendations within a period of **six (6) months** from the tabling of this report.