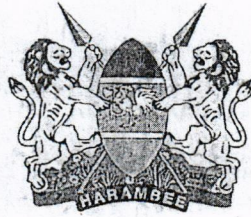


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TWELFTH PARLIAMENT

FIFTH SESSION

THE SENATE

THE STANDING COMMITTEE ON HEALTH

REPORT ON THE INQUIRY INTO ALLEGATIONS REGARDING  
IRREGULARITIES IN THE PROCUREMENT OF VARIOUS PHARMACEUTICAL  
EQUIPMENT AND PRODUCTS BY THE KENYA MEDICAL SUPPLIES  
AUTHORITY (KEMSA)

Clerk's Chambers  
Parliament Buildings,  
NAIROBI

DATE	30/3/2021
TIME	
CLERK AT THE TABLE	

*See Data on behalf of*  
*Chairperson Stanley*  
*on Health*  
*Gina H...*  
MARCH, 2021  
Mrs. M...

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## ABBREVIATIONS

AIA	-	Appropriations in Aid
CEO	-	Chief Executive Officer
COG	-	Council of Governors
COVID-19	-	Coronavirus Disease 2019
CS	-	Cabinet Secretary
DPP	-	Director of Public Prosecutions
EAC	-	East African Community
EACC	-	Ethics and Anti-Corruption Commission
FY	-	Financial Year
GF	-	Global Fund
GMP	-	Good Manufacturing Practices
HPTs	-	Health Products and Technologies
KEBS	-	Kenya Bureau of Standards
KEMSA	-	Kenya Medical Supplies Authority
KNCCI	-	Kenya National Chamber of Commerce and Industry
KNH	-	Kenyatta National Hospital
KRA	-	Kenya Revenue Authority
MoH	-	Ministry of Health
PFMA	-	Public Finance Management Act
PPADA	-	Public Procurement and Asset Disposal Act
PPB	-	Pharmacy and Poisons Board
PPES	-	Personal Protective Equipment
PPRA	-	Public Procurement Regulatory Authority
PS	-	Principal Secretary
SAGA	-	Semi-Autonomous Government Agency
UHC	-	Universal Health Coverage
UNFPA	-	United Nations Fund for Population Activities
USAID	-	United States Agency for International Development
WHO	-	World Health Organization

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## **PREFACE**

**Mr. Speaker Sir,**

### **Establishment of the Committees**

#### **The Standing Committee on Health**

The Senate Standing Committee on Health was constituted on Wednesday, 24<sup>th</sup> June, 2020 during the Fourth Session of the Twelfth (12<sup>th</sup>) Parliament pursuant to the provisions of standing order 187 (1) of the Standing Orders of the Senate which states:

*“Unless otherwise provided by any written law or these Standing Orders, the Senate Business Committee shall, in consultation with Parliamentary Parties, nominate Senators who shall serve on a Select Committee.”*

#### **Mandate of the Committee**

The Standing Committee on Health is mandated under the Second Schedule of the Standing Orders to consider all matters relating to medical services, public health and sanitation.

#### **Membership of the Committee**

The Committee is comprised of the following members-

1. Sen. (Dr.) Michael Mbiti, MP - **Chairperson**
2. Sen. Beth Mugo, EGH, MP
3. Sen. (Prof.) Samson Ongeru, EGH, MP
4. Sen. (Dr.) Abdullahi Ali, CBS, MP
5. Sen. Beatrice Kwamboka, MP
6. Sen. Ledama Olekina, MP
7. Sen. Fred Outa, MP
8. Sen. Mary Seneta, MP
9. Sen. Millicent Omanga, MP

#### **The Ad-hoc Committee on Covid-19 Situation**

The Ad-hoc Committee on Covid-19 Situation was established by a Senate Resolution at a sitting of the Senate held on Tuesday, 31<sup>st</sup> March, 2020. The Committee was mandated to oversight actions and measures taken by the national and county governments in addressing

the spread and effects of COVID-19 in Kenya and address the following, among other matters-

- (a) provision of testing and medical equipment, including adequate ventilators in referral hospitals and in at least one public hospital in each county;
- (b) provision of adequate isolation centres and Intensive Care Unit (ICU) facilities in each county;
- (c) measures to ensure continuous supply of food and other essential commodities at affordable prices;
- (d) measures to enable learners in educational institutions to continue with their studies;
- (e) measures to ensure protection, safety and well-being of healthcare and other frontline workers;
- (f) enhancement of capacity and flexible deployment of healthcare staff;
- (g) financial assistance to vulnerable persons and groups;
- (h) protection of residential and commercial tenants;
- (i) establishment of a stimulus package for the Micro, Small and Medium sized Enterprises;
- (j) easing of legislative and regulatory requirements for doing business;
- (k) measures to protect employees from retrenchment and job losses; and
- (l) uniform policies and procedures aimed at slowing and eventually stopping the spread of the virus.

At its 76<sup>th</sup> sitting of the Ad-hoc Committee on the Covid-19 Situation held on Wednesday, 12<sup>th</sup> August, 2020, the Ad Hoc Committee resolved to hold joint sittings with the Standing Committee on Health to inquire into the procurement irregularities at the KEMSA specific to the Covid-19 pandemic. The Honourable Speaker approved the request in August, 2020. The mandate of the Ad hoc Committee on the Covid-19 Situation lapsed on 30<sup>th</sup> October, 2020 and the Standing Committee on Health proceeded to conclude the inquiry.

#### **Membership of the Committee**

- 1) Sen. (Arch.) Sylvia Mueni Kasanga, MP - **Chairperson**
- 2) Sen. Mithika Linturi, MP - **Vice-Chairperson**
- 3) Sen. (Dr.) Michael Maling'a Mbiti, MP - Member
- 4) Sen. Erick Okong'o Omogeni, SC, MP - Member
- 5) Sen. (Dr.) Christopher Langat, MP - Member
- 6) Sen. Mwinjihaji Mohammed Faki, MP - Member

7) Sen. Abshiro Soka Halake, MP

- Member

**Secretariat of the Committees**

The Committee secretariat is comprised of –

- |                          |                                |
|--------------------------|--------------------------------|
| 1. Ms. Elizabeth Muhia   | - Principal Legal Counsel      |
| 2. Mr. Charles Munyua    | - Clerk Assistant              |
| 3. Mr. Mitchell Otoro    | - Legal Counsel                |
| 4. Mr. Edison Odhiambo   | - Parliamentary Budget Officer |
| 5. Mr. Hussein Ali Salat | - Parliamentary Budget Officer |
| 6. Mr. Humphrey Ringera  | - Research Officer             |
| 7. Ms. Clare Kidombo     | - Research Officer             |
| 8. Ms. Carol Kirorei     | - Clerk Assistant              |
| 9. Mr. Frank Mutulu      | - Media Relations Officer      |
| 10. Mr. Robert Rop       | - Audio Officer                |

**Acknowledgement**

The Committee wishes to thank the Offices of the Speaker and the Clerk of the Senate for the support extended to it in the conduct of the inquiry into allegations regarding irregularities in the procurement of various pharmaceutical equipment and products by KEMSA.

**Mr. Speaker Sir,**

It is my pleasant duty, pursuant to Standing Order 213 (6), to present the Report of the Standing Committee on Health on the inquiry into allegations regarding irregularities in the procurement of various pharmaceutical equipment and products by KEMSA for consideration by the House.



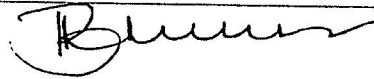
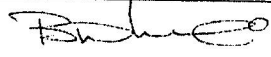
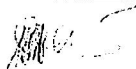
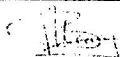

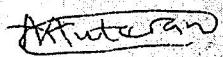
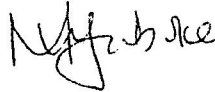
Signed.....

Date .....7/3/2021.....

**SEN. DR. MICHAEL MBITO, M.P.**

**CHAIRPERSON**

**THE STANDING COMMITTEE ON HEALTH**  
**REPORT ON THE ON THE INQUIRY INTO ALLEGATIONS REGARDING**  
**IRREGULARITIES IN THE PROCUREMENT OF VARIOUS PHARMACEUTICAL**  
**EQUIPMENT AND PRODUCTS BY KEMSA**  
**MEMBERS' ATTENDANCE LIST**

NO	NAME	SIGNATURE
1.	Sen. (Dr.) Michael Mbito, MP	
2.	Sen. Beth Mugo, EGH, MP	
3.	Sen. (Dr.) Samson Ongeru, EGH, MP	
4.	Sen. Abdullahi Ali Ibrahim, CBS, MP	
5.	Sen. Beatrice Kwamboka, MP	
6.	Sen. Fred Outa, MP	
7.	Sen. Ledama Olekina, MP	
8.	Sen. Mary Seneta, MP	
9.	Sen. Millicent Omanga, MP	

## EXECUTIVE SUMMARY

**Mr. Speaker Sir,** in July, 2020, the Standing Committee on Health was informed about various allegations of procurement irregularities at KEMSA involving several companies during the financial years 2017/2018 to FY 2019/2020. The Committee further noted numerous concerns raised by County Governments and health worker unions regarding the quality and cost of goods supplied by KEMSA in relation to the COVID-19 pandemic, particularly PPEs. The Committee therefore resolved to inquire into allegations of procurement irregularities at KEMSA involving several companies.

**Mr. Speaker Sir,** some of the red flags which necessitated the inquiry included-

1. utilization of Universal Health Coverage and the KEMSA Capital Budget to fund COVID-19 related procurement without authority;
2. irregular use of retrospective direct procurement method;
3. commencing COVID-19 related procurement process without an approved budget;
4. failure to integrate COVID-19 related procurement plan to the Budget process;
5. inefficient stock management procedures exposing KEMSA to value for money risk; and
6. awarding tenders to companies that had been in existence for less than one year.

**Mr. Speaker Sir,** pursuant to the mandate bestowed upon the Standing Committee Health, the Committee conducted an in depth and detailed inquiry on the areas of concern during the last six months. This report will clearly demonstrate that indeed glaring irregularities were present during the procurement of COVID-19 related items by KEMSA.

**Mr. Speaker Sir,** it is worth noting that the Auditor General's Special Audit Report on utilization of COVID-19 Funds by KEMSA for the period 13<sup>th</sup> March – 31<sup>st</sup> July, 2020 established that the KEMSA management violated provisions of the Public Procurement & Asset Disposal Act, 2015 in all material aspects; the budgetary management process for capital budgets did not comply with the Public Finance Management Act, 2012; and that given the inefficiency in the procurement process and the fact that 97 % of supplies procured were still lying in KEMSA Warehouses as at the time of audit, there was no value for money realized.

Mr. Speaker Sir, I must also highlight the findings of the PPRA on the procurement processes at KEMSA. The Report concluded that there were various contraventions of the provisions of Public Procurement and Asset Disposal Act, 2015 by KEMSA and the KEMSA CEO in the procurement for goods during the period under review.

Mr. Speaker Sir, in executing its mandate, the Committee was motivated largely with the desire that never again should public funds be expended irregularly, and that no person is above the law.

### Observations

The Committee during its inquiry observed a number of issues among which are-

1. there was need for better oversight, by MoH over KEMSA. In noting that KEMSA was a critical component within the health sector, the Committee observed that the CS, MoH, and the PS, MoH, needed to ensure that there was in place, an effective reporting and feedback mechanism between MoH and KEMSA in line with the function conferred on KEMSA under section 4(1) of the KEMSA Act;
2. there was a disconnect between the Board of KEMSA, the CEO, KEMSA and the board of management and in particular, the lack of timely reporting on the part of the CEO, KEMSA, particularly with respect to the utilization of funds for the procurement of COVID-19 related supplies. The fact that MoH and the Board of KEMSA were only engaged after the irregularities had taken place meant that any measures taken were only reactive as opposed to preventive or pro-active resolutions and further, this put the realisation of the objectives of KEMSA and its programmes into jeopardy;
3. there was lack of adherence to the reporting structures on the part of the CEO, KEMSA who acted in a manner that was counter-productive and that was contrary to section 8(3)(iv) of the Kenya Medical Supplies Authority Act as well as the *Mwongozo*: Code of Governance for State Corporations in ensuring that the Authority met its obligations under section 6 of the Act;
4. the chairperson, KEMSA, and the Board of KEMSA ought to have known about the procurement processes that had been carried out by the CEO, KEMSA, and the board of management. The fact that the chairperson wrote to the CS, MoH, informing him that KEMSA had utilised the monies meant for the UHC programme to finance the purchase of COVID-19 related items and further, by failing to take the necessary

- administrative action against the CEO, KEMSA, and the board of management meant that the chairperson and the Board of KEMSA failed to exercise effective oversight over the CEO, KEMSA, and the board of management;
5. that there was a deliberate attempt by the CEO, KEMSA, and the management of KEMSA to defeat the application of the law with respect to the procurement of medical supplies in response to COVID-19. Further, the CEO, KEMSA, took advantage of the disconnect and lack of an effective oversight mechanism to undertake the procurement of COVID-19 related items without an existing budget and beyond the KEMSA capital budget;
  6. at the time of the declaration of first case of COVID-19 in Kenya in March, 2020, the KEMSA budget did not make provision for the procurement of items in response to COVID-19. It was further observed that the procurement plans that were in place at the time only provided for the procurement of pharmaceuticals and non-pharmaceutical products that KEMSA procured in its day to day business;
  7. while section 43(1) of the PFMA empowers an accounting officer to re-allocate funds and the parameters within which such re-allocation may be made and while provision had been made for the revision of budgets under the National Treasury Circular No. 22-2019, no information was submitted by KEMSA of any steps taken by the CEO, KEMSA, to seek the necessary approvals for the re-allocation of the KEMSA capital budget for the procurement of COVID-19 related items. The Committee noted that instead, the CEO, KEMSA, issued commitment letters for the procurement of COVID-19 items without a corresponding review or re-allocation of its capital budget, and without the approval by the Board of KEMSA contrary to section 53(8) of the PPADA;
  8. the use of the KEMSA capital budget and funds meant for the UHC programme for the procurement of medical supplies in response to COVID-19 was not only irregular, but also put the implementation of the UHC programme in jeopardy as items meant to be procured under the UHC programme would either not be procured on time or at all, given that the funds had been diverted for a different purpose;
  9. given that the management KEMSA received communication from the Ag. Director General for Health informing them of the COVID-19 pandemic and requiring KEMSA to undertake the necessary preparations on 9<sup>th</sup> February, 2020, KEMSA ought to have taken the necessary steps towards planning for the COVID-19

pandemic in good time including carrying out a market survey as required under regulation 8(3)(z) of the Public Procurement and Disposal Regulations, 2006, to determine the commodities to be procured, the source and pricing in a manner that would ensure value for money;

10. whereas the initial procurements undertaken in March, 2020, were undertaken on an emergency basis, the fact that the COVID-19 pandemic continued for months after meant that KEMSA still had the time and opportunity to undertake a rapid market survey to guide it in the conduct of subsequent COVID-19 related procurements;
11. given that KEMSA did not carry out a market survey, it ought to have, in the least, used the lowest price submitted by the companies as a guide and the basis for determining the price at which to procure the COVID-19 related items or the basis for negotiating with the suppliers of the respective items prior to issuing commitment letters;
12. the failure by the board of management of KEMSA to undertake a needs assessment also meant that the commitment letters were issued and items were procured in quantities that did not tally with the prevailing needs thereby putting KEMSA in a financially precarious position and exposing it to financial loss;
13. the decision taken by the CEO, KEMSA, and the board of management of KEMSA to ignore the warnings issued by the Director of Procurement to the CEO, KEMSA, in April, May and June 2020 that the issuance of commitment letters be halted as these had exceeded the KEMSA budget meant that there was a deliberate attempt by the CEO, KEMSA, and the board of management of KEMSA to defeat the application of the law and a breach of the fiduciary duty imposed on public officers under Article 226 and 227 of the Constitution, the Public Officer Ethics Act and the PFMA;
14. the actions by the CEO, KEMSA, to proceed with the procurement of COVID-19 related items were contrary to sections 44 and 53 of the PPADA. The CEO, KEMSA, contravened section 68 of the PFM Act by failing to ensure that the resources for which he was the accounting officer were used in a way that was “lawful and authorised; and effective, efficient, economical and transparent”;
15. given the duration for which the COVID-19 related stock has been held by KEMSA, it was clear to the Committee that the reason given for the emergency procurement of the COVID-19 related items was not a sufficient justification for the procurement by KEMSA of the items in the quantities that it did, or the continued reliance on section

- 103 of the PPADA on the direct procurement of COVID-19 related items on an emergency basis;
16. the initiation of the procurement process was carried out contrary to section 73 of the PPADA and regulation 22 of the Public Procurement and Disposal Regulations, 2006 as these appeared to have been supplier driven and initiated at the instance of suppliers;
  17. despite section 56 of the PPADA authorizing a procuring entity to use the pre-qualification list of another public entity where its list was found to be insufficient, the board of management, KEMSA, did not do so but instead, procured from unlisted companies;
  18. some of the companies that were awarded tenders by KEMSA did not have the requisite experience required by KEMSA for the award of tender or the technical capability to deliver the items as required by KEMSA. In addition, KEMSA did not carry out any form of due diligence with respect to these companies as required under section 55 of the PPADA to determine if they had the capacity to enter into a contract with KEMSA or deliver the COVID-19 related items;
  19. the negotiations that were undertaken by KEMSA were not based on the prevailing market rates and were only undertaken as a mere formality as these were undertaken after the goods had been delivered and received by KEMSA;
  20. the establishment of the tender evaluation committees was a mere formality as they worked retrospectively. This is because the items being tendered had been delivered to KEMSA warehouses before the tender opening and evaluation processes had been undertaken. Further, KEMSA did not comply with section 46(4)(e) of the PPADA that imposes a requirement on an evaluation committee to adopt a process that shall ensure the evaluation process utilized adheres to Articles 201(d) and 227(1) of the Constitution;
  21. given that COVID-19 was a pandemic requiring urgent intervention, the management appropriately relied on section 103 of the PPADA for the direct procurement of items. The Committee however, noted that the CEO, KEMSA, and the board of management abused the legislative framework by failing to adhere to the procedures set out under the PPADA and PFMA and further that there was need to review the existing legislation to provide a more elaborate and clear legislative framework on the manner in which emergency procurements and the attendant processes should be undertaken;

22. KEMSA did not have in place, adequate mechanisms to ensure the uninterrupted supply of drugs and other medical supplies in the case of an emergency situation as was the case during the COVID-19 pandemic;
23. some of the pharmaceutical and non-pharmaceutical products supplied by KEMSA to the county governments had a short shelf life thereby forcing counties to seek alternative sources of products with a longer shelf life and further, some of the medical items supplied did not meet the required standards. The Committee therefore observed that there was need to have in place a better mechanism to ensure that the items entering the market were of the appropriate quality standard;
24. PPB ought to have access to the ports of entry in order to enable it assess the quality of medical products entering the Kenyan market in line with its mandate and hence the need for Circular OP/CAB 9/83A dated 4<sup>th</sup> June, 2019, to be revoked;
25. section 4(3) of the Kenya Medical Supplies Act be amended to remove the restriction imposed on the National and county governments to procure solely from KEMSA and enable the governments to procure from other medical suppliers;
26. the CEO, KEMSA, breached sections 52(3) and (4) and 57 of the PPADA and abdicated his responsibility under section 44 of the PPADA which imposes an obligation on an accounting officer of a public entity to ensure that the public entity complies with the provisions of the PPADA. Further, failure to ensure adherence to the provisions of the PPADA exposed KEMSA to financial risk and also posed a risk in terms of the quality of products that were delivered; and  
the necessary authorisations need to be issued by the PS, MoH and clearance by EACC urgently to allow KEMSA sell the medical supplies currently held by it at its warehouses at prevailing market rates. This would not only stave off any further losses to KEMSA but also ensure that the much needed medical supplies are availed to counties and all other medical institutions.

### **Recommendations**

Mr. Speaker Sir, based on the foregoing observations, the Committee makes far reaching recommendations among them-

1. That the ODPP and DCI investigate the CEO, KEMSA, and the board of management of KEMSA for contravening the following provisions –
  - (a) Articles 226 and 227(1) of the Constitution for the approval of use of

public funds contrary to law and undertaking a procurement processes that is fair, equitable, transparent, competitive and cost-effective;

- (b) sections 44(2)(a) and 45(3)(a) of the PPADA for failing to ensure that there was in place an approved budget prior to undertaking the procurement processes;
- (c) sections 44(2)(b) and 48 of the PPADA on the appointment of an inspection and acceptance committee for each procurement;
- (d) section 52(3) and (4) of the PPADA for failing to utilize the register list of another State organ where it found the Kenya Essential Medical List to be insufficient to cater for its procurement needs;
- (e) section 53(8) and (9) of the PPADA which prohibits an accounting officer for commencing the procurement processes without the existence of sufficient funds to meet the obligations of the resulting contract as reflected in its approved budget estimates
- (f) section 73 of the PPADA and regulation 22 of the Public Procurement and Disposal Regulations, 2006 for failing to initiate the procurements through purchase requisitions from the user departments;
- (g) regulation 8(3)(z) of the Public Procurement and Disposal Regulations, 2006, for failing to carry out periodic market surveys;
- (h) regulation 20(2) of the Public Procurement and Disposal Regulations, 2006, for failing to integrate its procurement plan with the budget;
- (i) regulation 43(b) and 54 of the PFM (National Government) Regulations, 2015 for failing to safeguard the resources entrusted in them and ensuring that they are applied for the purpose for which they were appropriated; and
- (j) regulation 51 of the PFM (National Government) Regulations, 2015, for committing funds without an approved procurement plan and budget.

Officers to be investigated include but are not limited to:

- (a) Dr. Jonah Manjari, CEO, KEMSA;
- (b) Charles E. Juma; Director, Procurement, KEMSA;
- (c) Mr. Eliud Mureithi, Director, Commercial Services, KEMSA;

- (d) Mr. Fredrick Wanyonyi, Corporation Secretary/Director, Legal Services, KEMSA;
  - (e) Mr. Edward Njoroge Njuguna, Director, Operations, KEMSA;
  - (f) Mr. Waiganjo Karanja, Director, Finance and Strategy, KEMSA; and
  - (g) any other officer of KEMSA who was involved in the procurement processes and who, upon investigation, is found culpable.
2. That the ODPP and DCI investigate the companies (set out in annex 2) that were awarded tenders by KEMSA to determine if there was any collusion between the CEO, KEMSA, the board of management of KEMSA and the directors of the companies in contravention of the PPADA and the PFMA and the debarment of any company found liable.
  3. The State Corporation Advisory Committee undertake an audit into the conduct of the Board of Directors of KEMSA and the board of management of KEMSA in accordance with section 27 of the State Corporations Act and make recommendations to the President and the CS, MoH, on the measures required to be put in place to ensure the effective management and functioning of KEMSA.
  4. The PPADA be reviewed to –
    - (a) provide an elaborate framework for the conduct of a rapid market survey in the case of an emergency procurement where the existing survey in a public entity is not reflective of the existing market environment;
    - (b) provide for –
      - (i) the publication of procurement plans by a public entity within five days of issuance of a tender in the company website and through such other media as shall be appropriate to ensure fairness and transparency and to provide for the publication of information regarding the various stages of the procurement cycle with respect to each tender;
      - (ii) publish an annual procurement projection setting intentions and probable timing in the coming 24-month period, with some indication of the probability of the intended procurements;
      - (iii) publish a complete list of current contracts with planned intentions for extension or market approach on a 24-month moving basis;
      - (iv) report any significant variations to the procurement program in its

annual report; and

(v) the review of this initiative be undertaken within one year of implementation to determine its efficacy.

5. A review of existing Regulations to provide for an elaborate framework for the conduct, by procuring entities, of emergency procurements and in particular, the implementation of section 103 of the PPADA by procuring entities.
6. An audit be undertaken of the existing reporting structures, financial disclosure mechanisms and internal audit processes in KEMSA, to identify any gaps and put in place measures to ensure effective oversight and collaboration between the Board of KEMSA, the management of KEMSA, PS, MoH and the CS, MoH.
7. An information data base be established for public procuring entities and accessible by all persons containing information on –
  - (a) procurement needs and plans of all public procuring entities;
  - (b) existing supplier capabilities in the market; and
  - (c) the various types of procurement processes, the roles of procuring entities and suppliers and the various obligations imposed on various parties by existing legislation under the PPADA and PFMA.
8. That boards of management of public entities undergo a mandatory and continuous training on public procurement and in particular, on the revised regulations on public procurement in Kenya.
9. Review the PPADA to strengthen the ability of the PPRA to enforce the provisions of the Act.
10. The Circular, Ref; *OP/CAB 9/83A* dated 4<sup>th</sup> June 2019 with respect to the Pharmacy and Poisons Board be revoked forthwith to allow access by PPB to the ports of entry and enable it execute its statutory mandate.
11. MoH to authorize KEMSA to dispose of medical items that were procured in response to the Covid-19 pandemic at prevailing market prices to stop the losses being incurred by KEMSA.
12. The KEMSA Act, as it currently exists, be reviewed as per annex 3, to ensure that Counties are allowed to procure medical items from entities other than KEMSA.

## CHAPTER ONE: INTRODUCTION

### 1.1 BACKGROUND

On 3<sup>rd</sup> July, 2020, the Standing Committee on Health was informed about various allegations of procurement irregularities at KEMSA involving several companies during the financial years 2017/2018 to FY 2019/2020. The Committee further took note of numerous concerns raised by County Governments and health worker unions regarding the quality and cost of goods supplied by KEMSA in relation to the COVID-19 pandemic, particularly PPEs.

Consequently, the Committee resolved to inquire into allegations of procurement irregularities at KEMSA involving several companies. Based on the foregoing, the Committee requested for the certified copies of the following documents for the FY 2017/18 to 2019/20 from KEMSA–

- (a) requests from the user departments;
- (b) authority letters;
- (c) original tender documents;
- (d) tender advertisement notices;
- (e) lists of all bidders from FY 2017/2018 to FY 2019/2020;
- (f) all bids submitted by bidders from FY 2017/2018 to FY 2019/2020;
- (g) tender opening minutes;
- (h) tender evaluation minutes;
- (i) due diligence reports;
- (j) professional opinions;
- (k) tender award notifications and regrets;
- (l) acceptance letters from the winning bidders;
- (m) contract agreements;
- (n) inspection and acceptance certificates;
- (o) payment vouchers;
- (p) all approved call downs;
- (q) minutes of the call down demand committee; and
- (r) cancelled call down.

In relation to the procurement of goods and services relating to the COVID-19 pandemic, the Committee further requested for certified copies of the following -

- (a) a comprehensive list of all items procured, including names, quantities and suppliers;
- (b) details of the procurement methods used;
- (c) all documents in relation to contracts awarded for COVID-19 emergency supplies, including cancellations where applicable;
- (d) all payment documents in relation to COVID-19 emergency supplies;
- (e) the cost of all the procured items;
- (f) delivery schedules; and
- (g) details of the verification process for all the procured items.

At its 76<sup>th</sup> sitting of the Ad-hoc Committee on the Covid-19 Situation held on Wednesday, 12<sup>th</sup> August, 2020, the Ad Hoc Committee resolved to hold joint sittings with the Standing Committee on Health to inquire into the procurement irregularities at the KEMSA specific to the Covid-19 pandemic. The Honourable Speaker approved the request in August, 2020. The mandate of the Ad hoc Committee on the Covid-19 Situation lapsed on 30<sup>th</sup> October, 2020 and the Standing Committee on Health proceeded to conclude the inquiry.

## **1.2 Terms of References**

The Committee on Health and the Ad-hoc Committee on the Covid-19 Situation sought to inquire into the alleged procurement irregularities at KEMSA in relation to the medical supplies procured in response to COVID-19 and establish the distinct roles and responsibilities of the MoH and KEMSA with regard to the procurement and supply chain of health products and technology, including PPEs in the FY 2019/2020 and FY 2020/2021.

Specifically, the Joint Committee sought to determine –

- (1) the role of MoH in the procurement of medical supplies through KEMSA in its preparedness and response to COVID-19;
- (2) the role of the Board of KEMSA in the procurement of medical supplies in response to COVID-19;
- (3) the extent to which KEMSA adhered to the Public Procurement and Asset Disposal Act, 2015, and the Public Finance Management Act, 2012, in the procurement of medical supplies for purposes of COVID-19;

- (4) if there were value for money in the procurement of medical supplies through KEMSA;
- (5) whether there are appropriate controls in place at KEMSA to prevent or detect material misstatements and other irregularities including fraud, corruption and other financial improprieties;
- (6) the effectiveness of the warehousing and distribution system managed and implemented by KEMSA;
- (7) the capacity of KEMSA to procure and deliver medical supplies during an emergency in an effective and efficient manner; and
- (8) verify if the medical supplies procured by KEMSA were of the appropriate standards and quality.

### **1.3 The Corona Virus Disease in Kenya**

COVID-19 is an acute respiratory infection caused by severe acute respiratory syndrome coronavirus 2 (SARSCoV-2). SARS-CoV-2 belongs to the Sarbecovirus subgenus of the Coronaviridae family and is the seventh coronavirus known to infect humans. Coronaviruses are a large family of enveloped RNA (ribonucleic acid) viruses, some of which cause illness in people e.g., common cold, SARS, MERS while others circulate among mammals e.g., bats, camels and birds.

COVID-19 began in Wuhan, China, in December 2019. WHO first declared COVID-19 to be a public health emergency of international concern on 30<sup>th</sup> January, 2020 and subsequently declared it a pandemic on 11<sup>th</sup> March 2020. The first confirmed case in Kenya was reported on 13<sup>th</sup> March 2020. COVID-19 was found to easily spread from person to person, through contact with droplets produced by a person who is sneezing or coughing or contaminated surfaces or objects with infected persons exhibiting symptoms such as fever, cough, headache, body aches and difficulty in breathing.

As of 17<sup>th</sup> February, 2021, the virus had resulted in more than 109,491,385 confirmed cases, 2,418,543 confirmed deaths in 219 countries, areas and territories globally. In Kenya, there were 103,188 confirmed cases and 1,797 deaths as at 17<sup>th</sup> February, 2021.

As at 10<sup>th</sup> February, 2021, researchers were testing 69 vaccines in clinical trials on humans, and 20 had reached the final stages of testing. At least 89 preclinical vaccines were under

active investigation in animals. The three vaccine front runners are those developed by Pfizer/BioNTech, Moderna and Oxford/AstraZeneca.

Before there was a confirmed case in Kenya, the MoH issued a press statement on 2<sup>nd</sup> February, 2020, assuring the public that the necessary surveillance and monitoring systems had been put in place in the country to avoid having the virus imported into the country. Additionally, MoH advised members of the public to- *“maintain basic hand and respiratory hygiene, and safe food practices; avoid close contact with people suffering from acute respiratory infections; in addition, anyone showing symptoms of respiratory illness such as fever, coughing, difficulty in breathing and sneezing with a history of recent travel to China was advised to go to the nearest health facility for assessment and prompt management.”*

On 28<sup>th</sup> February, 2020, the President issued Executive Order No. 2 of 2020 which primarily sought to establish the National Emergency Response Committee on Coronavirus. This Committee would incorporate the Cabinet’s Ad-Hoc Committee on Health and the Inter-Ministerial Committee on Government Response to the Coronavirus outbreak. According to the Executive Order, the Committee would be chaired by the CS, MoH with its terms of reference being to –

- (a) co-ordinate Kenya’s preparedness, prevention and response to the threat of the Coronavirus disease;
- (b) co-ordinate capacity building of medical personnel and other professionals, so as to enable the country respond quickly and effectively to any suspected cases or outbreak of the disease anywhere within the Republic;
- (c) enhance surveillance at all Ports/Points of Entry in Kenya;
- (d) co-ordinate the preparation of national, county and private isolation and treatment facilities;
- (e) co-ordinate the supply of testing-kits, critical medical products/ supplies, pharmaceuticals, masks and other protective gear within the Republic;
- (f) conduct Economic Impact Assessments and develop mitigation strategies with regard to the disease;
- (g) co-ordinate both local and international technical, financial and human resource assistance efforts with development partners and key stakeholders;

- (h) formulate, enforce and review processes and requirements that regulate the entry into Kenya of any persons or class of persons known or suspected to have travelled from a Coronavirus affected area; and
- (i) conduct any other matter ancillary to or in furtherance of any the foregoing Terms of Reference.

MoH was directed by the President to oversee the announcement of policy measures and behavioural protocols in response to the spread of the COVID-19 virus. In accordance with the presidential directive, the CS, MoH and other MoH officials undertook to brief the public through daily press briefings on developments related to the spread of the virus. The information included-

- (a) policy measures to be applied by relevant actors;
- (b) data on new cases of infection;
- (c) data on recovery of already infected patients;
- (d) protocols for avoiding infection by individual citizens and keeping the spread at a minimum; and
- (e) measures taken by the government in addressing the pandemic.

#### **1.4 Kenya Medical Supplies Authority (KEMSA)**

KEMSA is one of the SAGAs under the MoH established under the KEMSA Act, 2013. It has, as its principal mandate, the procurement, warehousing and distribution. of medical commodities to public health facilities in Kenya. Other functions of KEMSA include –

- (a) creating partnership frameworks with county governments for purposes of providing services in procurement, warehousing, distribution of drugs and medical supplies;
- (b) collecting information and providing regular reports to the national and county governments on the status and cost-effectiveness of procurement, the distribution and value of prescribed essential medical supplies delivered to health facilities, stock status and on any other aspects of supply system status and performance which may be required by stakeholders; and
- (c) supporting county governments in establishing and maintaining supply chain systems for drugs and medical supplies.

The public finances KEMSA operation costs from the exchequer through annual appropriations. As a strategic institution under UHC, KEMSA receives public funds from the National Government for the procurement of HPT's under the UHC flagship project.

### 1.5 Budgetary Allocation to the Ministry of Health

The printed estimates for MoH before COVID-19 in the FY 2019/20 amounted to Kshs.115.6 billion. This comprised Kshs.62.9 billion and Kshs.52.7 billion for current and capital expenditures respectively.

The Estimates were however adjusted in the supplementary No. II to Kshs.103.4 billion. This was comprised of Kshs. 62.5 billion and Kshs. 40.9 billion for current and capital expenditures respectively. This reflected a decrease of Kshs. 340.2 million and Kshs. 11.9 billion in current and capital expenditures respectively. The decrease in capital expenditure was mainly due to rationalization of the budget.

To address the COVID-19 pandemic, MoH was funded with Kshs. 3.9 billion, which comprising of Kshs.1 billion for recruitment of health workers, Kshs. 300 million for operations and Kshs. 2.6 billion to cover development as follows –

	Printed	SUP I	SUP II	SUP III	Final revised Estimates
Recurrent	58,083.90	4,816.10	(340.20)	6,350.00	68,909.80
<i>o/w KEMSA</i>	<i>3,102.00</i>				<i>3,102.00</i>
Development	34,640.00	12,376.70	(9,472.80)	818.50	38,362.40
<i>o/w KEMSA</i>		<i>262.50</i>			<i>262.50</i>
TOTAL	92,723.90	17,192.80	- 9,813.00	7,168.50	107,272.20
<i>o/w KEMSA</i>	<i>3,102.00</i>	<i>262.50</i>			<i>3,364.50</i>

The Estimates were further adjusted in the third supplementary and the gross approved allocation for MoH in the FY 2019/20 amounted to Kshs. 109.2 billion. This was comprised of Kshs. 66.3 billion and Kshs. 42.9 billion for current and capital expenditures respectively.

The Approved Estimates were adjusted to KSh.115.9 billion under Supplementary Estimates No. III comprising of Kshs.72.7 billion and Kshs. 43.2 billion for current and capital expenditures respectively. This reflected an increase of Kshs. 6.4 billion and Kshs. 350 million under current and capital expenditures respectively to cater for interventions geared towards addressing the COVID-19 pandemic.

### 1.6 Budgetary Allocation to KEMSA

The total budgetary allocation to KEMSA for the period FYs 2017/2018 to FY 2020/2021 is Kshs 12.84 billion out of which approximately Kshs. 10.73 billion are financed from appropriation in aid (AIA) as shown in Table 2 –

**Table 2: Summary of Budgetary Allocation to KEMSA for the Period of FY 2017/2018 to FY 2020/2021 in Kshs. Million**

FY	Current	Capital	Total	AIA	% of AIA to Total Budget
2017/18	2,579	94	2,673	2,195	82
2018/19	2,584	94	2,678	2,195	82
2019/20	3,102	262	3,364	2,711	81
2020/21	3,879	250	4,129	3,629	88
<b>Totals</b>	<b>12,144</b>	<b>700</b>	<b>12,844</b>	<b>10,730</b>	<b>84</b>

*Source: The National Treasury (Budget Books, Various)*

The budgetary allocation to KEMSA under MoH are current and capital transfers. The KEMSA's budget financing is mainly through AIA i.e. money that it generates from procurement, warehousing and sales of health products and technologies including basic health equipment to both levels of government and to the private health sector, which constituted an average of 84% during the four-year period.

The exchequer financing of the KEMSA's budget during the four years' period was a total of Kshs. 2.1 billion comprising of Kshs. 478 million in FY 2017/18, Kshs. 483 million in the FY 2018/19, Kshs. 653 million in the FY 2019/20 and Kshs. 500 million in the FY 2020/21.

In addition to the usual government appropriation, KEMSA does receive funding from other bilateral and multilateral donors such as USAID, GF and the World Bank among others. On COVID-19, KEMSA had various sources of funding for the period from March 2020 to June 2020. They include the Universal Health Coverage Fund that had Kshs. 13,047 million, KEMSA capital funds and other programmes funds appropriated by the National Assembly through MoH of Kshs. 1,800 million and the World Bank donation of Kshs. 1.062 million. Table 3 shows the various allocations with the amount of resources disbursed as at 30<sup>th</sup> June 2020 towards the COVID-19 interventions and UHC programmes as follows –

**Table 3: Funding towards COVID-19 Interventions in Kshs. Millions**

<i>S/No.</i>	<i>Project/Programme</i>	<i>Source of Funding</i>	<i>Amount</i>	<i>Receipt as at 30<sup>th</sup> June 2020</i>
1.	Transforming Health System	Donor (WB)	758.7	304.2
2.	Kenya COVID-19 Emergency Response team	Donor (WB)	454.8	77.8
3.	Procurement of Test Kits and reagents	GoK	1,500	1,500
4.	Supply of facemask to Vulnerable groups	GoK	300	300
5.	<b>Total</b>		<b>3,013.5</b>	<b>2,181.9</b>

While these were the appropriations towards COVID-19 interventions during this period ending June 2020, the special audit by the Auditor General shows that KEMSA had incurred Kshs. 8.4 billion towards the various interventions in the course of the ravaging pandemic but had only paid Kshs. 5 billion leaving pending bills totalling to Kshs. 3 billion as shown in Table 4 –

		<b>Approved COVID-19 budget</b>	<b>Amount incurred</b>	<b>Amount Paid</b>
1.	UHC Capital project	0	7,632	4,712.9

2	Transforming Health Systems project	758.7	304.2	304.2
3	Kenya COVID-19 emergency response	454.8	452.6	
	<b>Total</b>		<b>8,388.9</b>	<b>5,017</b>

### What necessitated the Inquiry

The Senate Standing Committee on Health at its third sitting held on 17<sup>th</sup> July, 2020, took note of, and deliberated upon, reports of various allegations of procurement irregularities in KEMSA involving several companies during the financial years 2017/2018 to FY 2019/2020. The Committee further took note of the numerous concerns raised by County Governments and health workers' unions regarding the quality of goods supplied by KEMSA in relation to the COVID-19 pandemic particularly PPEs. Some of the red flags which necessitated the inquiry included-

1. utilization of UHC and Capital Budget to fund COVID-19 related procurement without authority. Section 43 of the Public Finance Management Act authorizes an Accounting Officer to reallocate funds but may not reallocate funds where-
  - (a) the funds are appropriated for transfer to another government entity or person;
  - (b) the funds are appropriated for capital expenditure except to defray other capital expenditure;
  - (c) the reallocation of funds is from wages to non-wages expenditure; or
  - (d) the transfer of funds may result in contravention of fiscal responsibility principles.

Further an accounting officer for a national government entity, other than a state corporation, may reallocate funds between programs, or between sub-votes, in the budget for a financial year if---

- (a) there are provisions in the budget of a program or Sub-Vote which are unlikely to be utilized;
- (b) a request for the reallocation has been made to the National Treasury explaining the reasons for the reallocation and the National Treasury has approved the request; and
- (c) the total sum of all reallocations made to or from a program or Sub-Vote does not exceed ten percent of the total expenditure approved for that program or Sub-Vote for that financial year.

There was doubt whether this was followed by KEMSA hence necessitating the inquiry;

2. irregular use of retrospective direct procurement method. The application of direct procurement in line with Section 103 (e) which requires public entity to provide goods at fair and reasonable prices comparable with known prices of goods and services;
3. commencing COVID-19 related procurement process without an approved budget. Section 51(2) of the Public Finance Management Regulations requires expenditure commitments for goods and services to be controlled against spending and procurement plans approved by the responsible Accounting Officer, based only on allocations and allotments from approved budgets;
4. failure to integrate a COVID-19 related procurement plan to the Budget process;
5. inefficient stock management procedures exposing KEMSA to value for money risk; and
6. awarding tenders to companies that have been in existence for less than one year. Such companies are deemed not to have the necessary qualifications and experience to supply specialized medical equipment.

#### **Methodology of work**

The Standing Committee on Health and the Ad-hoc Committee on the Covid-19 Situation adopted various methods in undertaking the inquiry as follows –

- (a) analysis of tender documentation and various reports on the procurements undertaken by KEMSA with respect to the COVID-19 related items;
- (b) meetings with the Board and management of KEMSA and various stakeholders and investigative agencies;
- (c) field visits;
- (d) deliberative meeting sessions; and
- (e) the Committee identified the companies that had been awarded tenders by KEMSA (Annex 2) and further developed a sample from the list of suppliers provided by KEMSA (Table 5), in order to determine a representative sample from whom

information was sought and some of whom who also appeared before the Committee to respond to various issues identified by the Committee with respect to the tenders awarded to them by KEMSA. The criteria for the sample is as indicated in table 5 below-

**Table 5: List of companies selected by the Committee**

No.	Name of company	Criteria
1.	Megascop Healthcare (K) Limited	Involved in the procurement of supplies under the Managed Equipment Services (MES) and procurement of medical supplies for KEMSA  Awarded multiple tenders
2.	Angelica Medical Supplies Limited	Involved in the procurement of supplies under the Managed Equipment Services (MES) and procurement of medical supplies for KEMSA  Awarded multiple tenders
3.	Briema Grains Stores Limited Limited	Registered for less than a period of 2 years  Awarded multiple tenders
4.	Zebra Investments Limited	Registered for less than a period of 2 years
5.	Shop 'N' Buy Limited	Registered for less than a period of 2 years
6.	Kilig Limited	Registered for less than a period of 2 years
7.	Nanopay Limited	Registered for less than a period of 2 years
8.	Komtel Kenya Limited	Awarded multiple tenders
9.	Wallabis Ventures Limited	Awarded multiple tenders
10.	Medilab and Allied Products (K) Limited	Awarded multiple tenders
11.	Dominion Supplied (K) Limited	Awarded multiple tenders
12.	Purma Holdings Limited	Awarded multiple tenders

13.	Armick Limited	Awarded multiple tenders
14.	Villa Surgical & Equipment Limited	Awarded multiple tenders
15.	Teleflex Medial Technologies Limited	Awarded multiple tenders
16.	Everywhere Distributors Limited	Awarded multiple tenders
17.	Regal Freighters	Awarded tender in the amount of Kshs. 270,000,000
18.	Bennetts Ventures Limited	Awarded tender in the amount of Kshs. 180,000,000
19.	Aszure Commercial Services Limited	Awarded tender in the amount of Kshs. 180,000,000
20.	Meraky Healthcare Limited	Awarded tender in the amount of Kshs. 171,465,000
21.	Gladlab Supplies Limited	Appearing in OAG report as having supplied masks at a price higher than what had previously been agreed upon

**CHAPTER 2: SUBMISSION OF EVIDENCE ADDUCED BEFORE THE COMMITTEE**

The Committee adopted a work plan and resolved to meet various stakeholders. The stakeholders appeared before the Committee as detailed in the schedule below-

**Table 6: Committee Work Plan**

NO.	DATE	ORGANIZATION	AGENDA
1.	11 <sup>th</sup> August, 2020	PS, MoH	Meeting to discuss- a) roles and responsibilities of the Ministry of Health and KEMSA with regard to the procurement and supply chain of health products and technology, including personal protective equipment (PPEs) in the FY 2019/2020 and FY 2020/2021 b) The utilization of the budgetary allocations of Kshs 5.3 Billion for essential health products and technology under the UHC Programme
2.	21 <sup>st</sup> and 28 <sup>th</sup> August, 2020	KEMSA	Meeting to discuss alleged irregularities in procurement of medical equipment and products at KEMSA
3.	14 <sup>th</sup> September, 2020	Auditor General, Pharmacy and Poisons Board, the Kenya Bureau of Standards	Meeting to discuss alleged irregularities in procurement of medical equipment and products at KEMSA
4.	16 <sup>th</sup> September, 2020	Council of Governors	Meeting to discuss the ability of KEMSA to supply the counties, the quality of goods supplied and challenges faced in the procurement of medical supplies

5.	23 <sup>rd</sup> September, 2020	Public Procurement Regulatory Authority	Meeting to receive the preliminary report on findings on alleged procurement irregularities at KEMSA
6.	23 <sup>rd</sup> September, 2020	Ethics and Anti-Corruption Commission	Meeting to receive the preliminary report on findings on alleged procurement irregularities at KEMSA
7.	24 <sup>th</sup> September, 2020	The Kenya National Chamber of Commerce and Industry	Meeting to discuss engagements of the KNCCI with KEMSA and mobilization of local small, medium and large producers for tenders with KEMSA
8.	30 <sup>th</sup> September, 2020	Auditor General	Meeting to receive the report on the special audit on the alleged procurement irregularities at KEMSA (Annex 4)
9.	7 <sup>th</sup> October, 2020	Public Procurement Regulatory Authority	Meeting to receive the final report on investigations into the alleged procurement irregularities at KEMSA (Annex 5)
10.	19 <sup>th</sup> November, 2020 and 2 <sup>nd</sup> December, 2020	Suppliers i.e. Angelica Medical Supplies Limited, Bell Industries Limited and Shop 'N' Buy Limited	Meeting to discuss the procurement processes with KEMSA
11.	1 <sup>st</sup> December, 2020	KEMSA	Site visit, KEMSA offices
12.	2 <sup>nd</sup> December, 2020 and 7 <sup>th</sup> December, 2020	Shop N Buy Limited	Meeting to discuss the procurement processes with KEMSA
13.	3 <sup>rd</sup> December and 14 <sup>th</sup> December, 2020	Bell Industries Limited	Meeting to discuss the procurement processes with KEMSA

14.	14 <sup>th</sup> December, 2020	Ministry of Health	Meeting to discuss whether the Ministry has given written instructions to the KEMSA to sell PPEs at prevailing market price
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## **2.1. Submissions from the Principal Secretary, Ministry of Health**

At a meeting held on 11<sup>th</sup> August, 2020, the Standing Committee on Health met the PS, MoH who briefed the meeting on queries raised by the Committee in its letter dated 23<sup>rd</sup> July, 2020 as follows with regard to the distinct roles and responsibilities of the Ministry of Health and KEMSA with regard to the procurement and supply chain of health products and technology, including PPEs in the FY 2019/2020 and FY 2020/2021

### **2.1.1 With regard to procurement and supply chain of health products and technologies, to ensure smooth and effective procurement, MoH-**

1. regularly updates and disseminates the Essential Health Products and Technologies lists for purposes of guiding the selection process for public sector procurements. The EHPTs include Kenya Essential Medicines List, Kenya Essential Medical Supplies List and Kenya Essential Diagnostic List;
2. develops procurement lists for procurement of HPT under UHC funding, GF funding, UNICEF for vaccines under GAVI funding and parallel donor funding including Medical Commodities Project under USAID;
3. issues authorization to KEMSA to undertake procurements for the UHC-funded items as per the procurement lists; issues them with the supporting AIEs and, subsequently, the exchequer funds;
4. forwards the GF procurement lists to the National Treasury for approval and transmission to KEMSA, with the supporting AIEs and, subsequently, payments;
5. forwards the MCP procurement lists to KEMSA for onward transmission for approval by USAID, and release of the funds for payments to KEMSA;
6. forwards the procurement lists for vaccines to UNICEF for procurements using GAVI funding;
7. develops procurement specifications for EHPTs and sends them alongside the procurement lists;

8. develops distribution lists for all parallel programme products and shares them with KEMSA and Counties;
9. distributes vaccines to all parts of the whole country;
10. in consultation with the Counties, agrees on the criteria for determining drawing rights for HPTs under UHC for purposes of equity. The annual drawing right figure for each County is reflected in the Inter-Party Agreements signed between MOH and each respective County;
11. allocates each of the National Referral Hospitals budgets for HPT under UHC, utilizable as a drawing right through KEMSA;
12. communicates to KEMSA the annual drawing rights for HPTs for all the Counties and the National Referral Hospitals;
13. on a quarterly basis, monitors the procurements and distribution by KEMSA of the HPTs under UHC to the intended beneficiaries i.e. counties and the National Referral Hospitals; and
14. requisitions the exchequer for HPT procurement under UHC through the cash flow projections, and makes payments to KEMSA.

**2.1.2 With regard to the procurement of PPEs and Testing Kits, to ensure smooth and effective procurement of the same, MoH-**

1. develops procurement lists and specifications for GOK, World Bank (WB), GAVI and GF funding procurements;
2. issues authorization to KEMSA and UNICEF respectively for split procurements for the WB and GAVI funding;
3. makes payments to KEMSA and UNICEF for the WB supported procurements. GAVI makes payments directly to UNICEF for the procurements that they support;
4. forwards to the National Treasury for approval the procurement list for GF funding and onward transmission to KEMSA. The National Treasury effects payment for the procurements;
5. receives donations and directs them to KEMSA for warehousing and distribution;
6. develops and transmits distribution lists for donations to KEMSA;
7. monitors the distribution of donations by KEMSA
8. makes payment to KEMSA for the warehousing and distribution of donations on submission of invoices; and

9. in conjunction with PPB, monitors quality issues of the donations.

**2.1.3 With regard to the procurement and supply chain of health products and technology, KEMSA does the following-**

1. undertakes procurements as per the MOH procurement lists for HPTs for UHC;
2. warehouses and distributes HPTs for UHC on a demand-driven 'pull' system of supply on a quarterly basis and based on the drawing for Counties and National Referral Hospitals;
3. provides MOH with the cash flow projections for the procurements for HPT under UHC;
4. undertakes the procurements as per the GF procurement lists for programme products as provided by the National Treasury;
5. undertakes the distribution of parallel programme medical supplies as per the distribution lists provided by MOH;
6. undertakes procurements as per the procurement lists for PPEs and test kits provided by MOH;
7. provides MOH with cash flow projections for procurements for PPEs and test kits;
8. warehouses and distributes PPEs and test kits as per the distribution lists provided by the Ministry of Health for both donations and those for procurements; and
9. submits invoices for warehousing and distribution of donated PPEs and test kits to the Ministry of Health for payments.

The PS, MoH further noted that KEMSA capital funds are used to procure essential HPTs, PPEs and test kits in bulk and therefore at very cost-effective prices (and pass the benefit to the customers and therefore Kenyans) in readiness for sale to MoH, Counties, National Referral Hospitals, other public health facilities and entities.

With regards to the utilization of the budgetary allocations of Kshs 5.3 Billion for essential health products and technology under the UHC Programme, the PS, MoH noted that the procurement of HPTs under UHC through KEMSA for the FY 2019/2020 were made as follows-

**Table 7: procurement of HPTs under UHC through KEMSA for the FY 2019/2020**

	Category of HPT	Value (Kshs.)
1.	Essential Medicines	5,117,417,659.00
2.	Supply for limited number of Non-essential medicines as justified in the remarks	734,000,757.00
3.	Non-Pharmaceuticals	1,938,767,946.00
4.	Medical Laboratory Supplies	498,132,829.00
5.	Clinical Nutrition Products	54,213,600.00
	<b>Total value of the procurements</b>	<b>8,342,532,791.00</b>

The PS, MoH stated that some items contained in the lists provided were drawn by both counties and National Referral Hospitals for free meaning that the items were not charged to the drawing rights because of the nature of the public health priority. Such items included Cotrimoxazole Tab. 960mg (Double Strength) for opportunistic infections in HIV/AIDS and Gene X-pert cartridges. The PS further noted that counties were allowed to freely draw items of up to Kshs 5.1 Billion based on the County drawing rights as reflected in the IPA. The drawing would be executed until the counties exhausted all the rights.

## **2.2. Submissions from the Kenya Medical Supplies Authority (KEMSA)**

At the 1<sup>st</sup> Joint Sitting held on Friday, 21<sup>st</sup> August, 2020, and the 2<sup>nd</sup> and 3<sup>rd</sup> Joint Sitzings held on Friday, 28<sup>th</sup> August, 2020 within the Parliament Buildings, the Standing Committee on Health and the Ad hoc Committee on the COVID-19 Situation met with the Board and management of KEMSA. The following emerged from the submissions received at the meetings-

1. the KEMSA Board approves the budget and procurement plan at the beginning of the financial year and thereafter is not involved in the day to day running of KEMSA;
2. upon the declaration of COVID – 19 as a pandemic in March 2020, the procurement procedures changed and were done on an emergency basis. PPRA and the Solicitor General issued directions to KEMSA on how to deal with the emergency procurement;

3. KEMSA received funds from MoH for the procurement of COVID-19 related items and the same were used for that purpose. KEMSA capital was also utilized for the procurement of COVID-19 related items;
4. the quantities of items to be procured was guided by COVID – 19 and also normal business, noting that it was unclear how long the pandemic would last;
5. the letter dated 15<sup>th</sup> April, 2020, from the PS, MoH, issuing instructions to KEMSA to procure COVID-19 related items from suppliers was not irregular and KEMSA procured items based on it;
6. KEMSA relied on sections 69 and 103 of the PPADA and the letter dated 15<sup>th</sup> April, 2020 by the PS, MoH, that is purported to have given direction to KEMSA on who to procure from and the pricing, creates an erroneous perception. It was submitted by KEMSA that the PS, MoH, did not direct KEMSA to procure from the said suppliers, but rather, KEMSA had forwarded a letter to the PS, MoH, under section 69 on retrospective procurement asking for funds for the procurements that had been concluded, to which the PS, MoH, responded and attached a list of the concluded procurement together with the suppliers and the pricing;
7. KEMSA had a list of registered suppliers but most of the items that were procured for COVID-19 were not stocked by KEMSA, thus they did not have registered suppliers for most of COVID-19 related items. KEMSA used a combination of suppliers on the registered list and those that were not registered for the items that were not in their normal inventory items;
8. the suppliers did not have a role in determining what was to be supplied. The suppliers were requested to give letters of intent of the items and quantities that they could deliver. KEMSA requested them, through the letters, to state their ability to supply the specific items;
9. with regard to the email by the Board Chairman giving instructions to the CEO, KEMSA to execute a contract for the supply of COVID-19 related items by Kilig Limited, it was submitted by the Chairman that KEMSA was not required to ask the EACC for permission to execute the contract, because KEMSA would have faced serious consequences had the timeline for the tender expired;

10. the EACC wrote to the Chairman of the Board and copied the CS, MoH advising that the CEO, the Director, Procurement and the Director, Commercial Services be suspended with immediate effect until investigations into their conduct was concluded. The Board followed the EACC advisory and proceeded to suspend the said officials;
11. the Company Secretary, Mr. Fredrick Wanyonyi, was issued with a suspension letter detailing the reasons for his suspension and a committee had been set up to investigate the allegations therein;
12. regarding the concern that the prices at which the COVID-19 related items were procured were high, it was submitted by the chairperson and the CEO of KEMSA that the prices of items around April, 2020, when KEMSA undertook the procurements were very high owing to the lockdown in various countries from which the commodities were to be procured and the high demand for the said items worldwide;
13. KEMSA issued commitment letters to suppliers who had confirmed that they were able to supply the goods, and upon delivery and inspection, substandard supplies were returned to the respective suppliers. However, if the goods passed the quality tests, the suppliers were given the tender documents culminating in the signing of a contract;
14. the Director, Procurement issued memos advising against procurement of further COVID-19 related items as there was adequate stock and no budget for the procurement. The management held a meeting and resolved to proceed with the procurement and that mobilization of funds would be done to meet the gap;
15. the lead time for the procurement process was between four to six months;
16. the Board of KEMSA was aware of all procurements and all sources of funds at KEMSA but was unaware of procurements carried out in excess of the available budget;
17. the CEO, KEMSA, did not inform the Board of KEMSA regarding the procurements that were undertaken in excess of the budget and did not seek the approval of the Board of KEMSA to procure the said items from the Board;
18. the CEO, KEMSA was under pressure to provide commodities and received numerous communications including the CS and PS, MoH in form of SMS and phone calls;

19. KEMSA was advised by the Director, Legal and the Director, Procurement to use section 69 (2) of the PPADA to undertake the procurements on an emergency basis. Section 69 (2) provides that *"no procurement approval shall be made to operate retrospectively to any date earlier than the date on which it is made except on procurements in response to an urgent need"*;
20. EACC began its investigations on KEMSA *suo moto*; and
21. the distribution lists for all donations including Jack Ma donations would be submitted to the Committee. However, the donations were received at the airport and stored at the KEMSA Warehouse and distributed according to a distribution list received from the MoH. Every item received as a donation was distributed and none remains at the warehouse.

#### **Visit to the KEMSA Warehouse**

The Committee undertook a site visit to the KEMSA offices and warehouse on Tuesday, 1<sup>st</sup> December, 2020. At a meeting held at the KEMSA premises, the Ag. CEO, KEMSA briefed the Committee as follows-

1. KEMSA bought goods worth Kshs. 7.6 billion for the COVID-19 pandemic and had in stock goods worth Kshs. 5.9 billion;
2. goods worth Kshs. 1.8 billion had been sold as at the date of the meeting;
3. goods worth Kshs. 2.9 billion were ready for sale but were yet to be processed. Negotiations for the goods between KEMSA and the suppliers were yet to be completed. This was on account of a letter from the EACC suspending all procurement processes pending investigations;
4. a letter dated 30<sup>th</sup> November, 2020 was sent to the CS, MoH by the KEMSA CEO communicating the current stock balances at KEMSA, including items that were ready for sale;
5. with regard to PPEs, the current stock was 317,409 units and stock that was ready for sale was 115,690 units. The difference in stock had not been negotiated between KEMSA and the suppliers following the stoppage of procurement pending EACC investigations;

6. the CS, MoH had made a declaration which was carried in the media, that PPEs stored at the KEMSA warehouse would be sold at the prevailing market rates. However, the MoH had not issued official written communication to KEMSA to sell the PPEs at the current market prices;
7. the projected loss to KEMSA was about Kshs. 2.9 billion if goods were sold at current market rates. This figure increases with time as the market prices are getting lower;
8. KEMSA had paid approximately Kshs. 4.7 billion to suppliers as at the date of the site visit out of the Kshs. 7.6 billion owed to suppliers; and
9. donations received as per distribution lists were stored at KEMSA and distributed as per distribution lists sent to KEMSA by MoH.

The Committee proceeded to visit the Warehouse where it confirmed that indeed there was plenty of stock that was yet to be processed.

### **2.3. Submissions from the Auditor General**

At the 5<sup>th</sup> Joint Sitting held on Tuesday, 14<sup>th</sup> September, 2020, and the 11<sup>th</sup> Joint Sitting held on Wednesday, 30<sup>th</sup> September, 2020, through the Zoom online meeting platform, the Standing Committee on Health and the Ad hoc Committee on the COVID-19 Situation met with the Auditor General. The Auditor-General submitted as follows-

1. The request received by the Office of the Auditor General was to report on whether –
  - a) KEMSA adhered to the Public Procurement and Asset Disposal Act, 2015 in the procurement of medical supplies for purposes of combating the COVID-19 pandemic;
  - b) KEMSA adhered to the Public Finance Management Act, 2012 (PFMA, 2012) in the procurement of medical supplies; and
  - c) there was value for money in the procurement of medical supplies through KEMSA, for purposes of combating the pandemic.
2. The special audit was covered by the following Terms of Reference -
  - a) review the budgeting and financing process at KEMSA in relation to procurement of medical supplies for purposes of combating the COVID-19 pandemic; and
  - b) review the procurement process of expenditures incurred by KEMSA in relation to medical supplies for combating the COVID-19 pandemic.

3. In summary the special audit established the following-
  - a) in regard to adherence to the PPADA, the KEMSA management violated provisions of the Act in all material aspects;
  - b) in regard to adherence to the PFMA, the budgetary management process for capital budgets did not comply with the Act; and
  - c) given the inefficiency in the procurement process and the fact that 97 % of supplies procured were still lying in KEMSA Warehouses as at the time of audit, there was no value for money realized.
4. The report details the finding from the audit in two broad sections i.e. findings on budgetary processes and findings on procurement process.

#### **Budget Management for COVID-19 related expenditure**

1. The special audit established that during the period under review, KEMSA incurred a total of Kshs.8,388,872,706 towards the procurement of Covid-19 related items;
2. during FY 2019/2020, the Board of KEMSA approved a total capital budget of Kshs.4,655,709,000 to finance capital operations at KEMSA. At the time, no provision had been made for the procurement of COVID-19 related items. There was also no evidence that upon the outbreak of the Covid-19 Pandemic, the management and Board of KEMSA either re-allocated any of the capital budget amount of Kshs.4,655,709,000 or requested for a supplementary capital budget to cater for the emerging Covid-19 related procurements. Therefore, the KEMSA capital budget for financial year 2019/2020 did not have any allocation for Covid-19 related procurements.
3. on 12<sup>th</sup> June, 2020, the CEO, KEMSA requested the PS, MoH, for approval to utilize UHC funds to pay for expenses incurred for the emergency procurements for Covid-19 related procurements. This request was declined by the PS, MoH in her letter referenced MOH / FIN/1/4 VOL III (77) to the CEO, KEMSA. There was therefore no approval by the MoH for KEMSA to utilize UHC funds to pay for expenses incurred on emergency procurements for Covid-19 related procurements.
4. contrary to the decline and advisory by the PS, MoH, the chairperson, KEMSA, wrote to the CS, MoH, in a letter ref. KEMSA/CEO/ADM/2020/115 dated 20 August, 2020, indicating that KEMSA had utilized the UHC budget to fund the COVID-19 related procurements;

5. according to the KEMSA financial records, some of the expenditures had been narrated as having been funded from KEMSA capital budget. This was a clear indication of comingling of UHC and KEMSA Capital funds both of which were irregularly used to fund Covid19 related expenditures;
6. MoH allocated an amount of Kshs.13,047,073,119 to KEMSA to finance UHC. Out of this amount, only Kshs.8,520,232,791 was disbursed to KEMSA. A further, amount of Kshs.333,470,873 was disbursed by Ministry of Health to KEMSA for payment of Tax on USAID procured HPTs;
7. the audit established that KEMSA had irregularly issued commitment letters amounting to Kshs.7,780,281,788 to various suppliers, out of which supplies of Kshs.7,632,068,588 had been delivered to KEMSA;
8. by irregularly procuring items valued at Kshs.7,632,068,588 under UHC and Capital Budgets without the requisite approvals, the Accounting Officer and the management of KEMSA violated Section 68 (1) of the PFMA that requires Accounting Officers to ensure resources within their entities are used in a lawful, effective, efficient, economical and transparent manner; and
9. the audit found that the PS, MoH, approved the procurement of goods by KEMSA worth Kshs.758,690,583 that was detailed in an Annexure attached to the request received via email dated 07 April, 2020 from Mr. Eliud Mureithi, Director of Commercial Services, KEMSA. The annexure provided by KEMSA contained description of items to be procured, the unit of measure, supplier, quantity and unit price.

#### **Procurement process for COVID – 19 related expenditure**

10. The special audit identified the following violations to the PPADA –

##### **(a) Irregular use of retrospective Direct Procurement method – Kshs. 8,388,872,706**

The management of KEMSA commenced procurement of Covid19 related items on 18<sup>th</sup> March, 2020, using retrospective direct procurement method without putting in place systems and procedures to guide the use of retrospective Direct Procurement contrary to sections 69 (2) and 45 (1) of the PPADA, both of which require prior approvals for this of this method and existence of appropriate procedures and systems to guide the process.

**(b) Commencing procurement process without approved Budgets – Kshs. 7,780,281,788**

Despite KEMSA having no budget allocation for Covid-19 related procurements, KEMSA issued commitment letters amounting to Kshs.7,780,281,788 on Covid-19 related procurements yet there was no Capital and UHC budgetary allocation for the same contrary to section 53 (8) of the PPADA that prohibits accounting officers from initiating procurement proceedings without approved budgets.

**(c) Failure to integrate procurement plan to the Budget process – Kshs. 5,096,027,600**

Management of KEMSA developed a procurement plan amounting to Kshs.5,096,027,600 for Covid-19 related items to be funded from KEMSA Capital Budget yet there was no approved Budget for the same contrary to Section 53 (5) of the PPADA which requires procurement planning to be integrated with Budgetary process.

**(d) In efficient stock management procedures exposing public funds to Value for Money risks – Kshs. 6,346,784,383**

Section 139 (2) of the Public Finance Management Regulations, 2015, requires accounting officers to ensure that processes and procedures are in place for effective, efficient, economical and transparent use of government assets. The Auditor General found as follows –

- (i) despite KEMSA having procured items based on urgency, stock worth Kshs. 6,346,784,383 was still being held at KEMSA, 97% of which had stayed for as long as 3 months implying there was no urgency for these procurements.
- (ii) from the market survey on the affected stock items, the stock, if sold at current market prices, would only realize Kshs. 4,008,523,203 resulting in a loss of Kshs.2,338,261,175.
- (iii) it was therefore clear that KEMSA over procured Covid-19 related stock without an objective assessment and forecasting of the existing demand for the products. Consequently, the products are lying idle in the warehouses tying up the KEMSA Working capital. This will adversely affect KEMSA's financial

performance by increasing liabilities, reduction in liquidity and therefore increased going concern risks of the Authority contrary to section 139 (2) of the Public Finance Management Regulations, 2015.

**(e) Failure to conduct market survey for items being procured – Kshs. 8,388,872,706**

Section 103 (2) (e) of the PPADA requires procuring entities using Direct Procurement method to ensure acquisition prices are fair, reasonable and compares well with known prices of goods and services. The Auditor General found that there was no evidence that procurement of the Covid-19 related items was guided by a market survey contrary to section 103(2)(e) of the PPADA.

**(f) Engaging non-prequalified suppliers with inadequate experience in the market – Kshs. 871,640,000**

Section 71 of the PPADA requires procuring entities to maintain a list of prequalified suppliers with necessary qualifications. The Auditor General established that procurements amounting to Kshs.871,640,000 were made from firms that were not prequalified and therefore did not demonstrate adequate experience in dealing with medical products.

**(g) Red flags indicating possible procurement frauds – Kshs. 1,285,860,000**

The Auditor General established that there were companies that had been in existence for a period of less than one year which were awarded contracts to supply Covid-19 e.g. Kilig Ltd and Shop 'N' Buy Ltd which were registered on 22 January, 2020 and 14 February, 2020 respectively.

11. During the period under review, KEMSA irregularly utilized UHC and the KEMSA capital budget to procure COVID-19 related items worth Kshs.7,632,068,588 without evidence of approval of the budgets by relevant authorities. The procurement process was not initiated based on need assessment and planning resulting in over procurement of Covid-19 related stock worth Kshs. 6,346,784,383 that is still being held at KEMSA warehouses. 97 per cent of the stock has been in the KEMSA Warehouses for more than

3 months implying inadequate market forecasting and planning practices at KEMSA. The items were procured at a higher price as compared to the current market pricing implying that KEMSA may realize a loss of Kshs. 2,338,261,175 if the products are to be sold at the current market price.

#### **2.4. Submissions from the Pharmacy and Poisons Board**

At its 5<sup>th</sup> Joint Sitting held on Tuesday, 14<sup>th</sup> September, 2020, via the Zoom online meeting platform, the Standing Committee on Health and the Ad hoc Committee on the COVID-19 Situation met with the PPB. The CEO, PPB, submitted as follows-

1. whereas at the time of the brief, the Board had not received official communication on the whole list of items procured by KEMSA, information available on the Board's Import Records for the period ranging from 1<sup>st</sup> March, 2020, to 31<sup>st</sup> August, 2020, indicated that a total of two hundred and forty-three import permit applications had been made by KEMSA;
2. products imported vide the said import applications had met the requisite requirements of safety, quality and efficacy;
3. the Pharmacy and Poisons Act requires that every distributor of pharmaceutical or medicinal products in Kenya adheres to the prescribed PPB Guidelines on Good Distribution Practices, Transportation of Pharmaceutical products and Safe Disposal of Pharmaceutical Waste. KEMSA, as the Government's procurement agency is recognized as a distributor and therefore bound by the stipulated guidelines;
4. PPB, during the pandemic period, emphasized the implementation of a risk-based approach to regulatory inspections due to government restrictions, including social distancing;
5. during the COVID-19 period, PPB conducted an inspection of the KEMSA main warehouse and sampled various PPEs for analysis;
6. since the advent of the COVID-19 pandemic, PPB had taken deliberate steps to facilitate the expeditious access and availability of safe, efficacious and good quality health products and technologies. To ensure this, PPB had implemented the Emergency Use Authorization Procedure and Compassionate Use;
7. PPB has robust mechanisms for assessment of the quality of medical products to be placed on the Kenyan market through implementation of a marketing authorization process, control of imports and exports and post-market surveillance;

8. it is a requirement for medical supplies to be imported via *gazetted* ports of entry. PPB had therefore stationed its inspectors at such *gazetted* ports of entry for purposes of verification of medical consignments to ensure compliance with approved specifications. However, the Board received a Circular, OP/CAB 9/83A dated 4<sup>th</sup> June 2019, re-categorizing partner government agencies at the ports of entry. This re-categorization placed the Board in category 4;
9. in effect, this meant that PPB could not operate from the ports of entry and intervention of consignments for verification as above stated is based on permission granted by the lead port agencies KRA and KEBS;
10. this had greatly hampered the work of PPB at the Ports of entry and left PPB to rely heavily on post market surveillance activities. Unhindered intervention at the ports of entry remains critical in safeguarding public health;
11. PPB, in terms of donations has a clearly established procedure for consideration of such applications as outlined in the Guidelines on Donations. In the period under review, from the Import Records, KEMSA had made applications for donation import permits for anti-TB medications, antibiotics, anti-retrovirals and other medicinal substances.
12. other development partners such as WHO, UNFPA among others made similar applications. However, in a uniquely isolated case, concerning the “*Jack MA Donation*”, publicly alleged to contain PPEs and SARS COV-2 diagnostics kits and related consumables, the Board import permit record does not indicate such an application from the recipient entity as would be the case. Consequently, PPB made enquiries and advised MoH to allow evaluation of the said products for safety, quality and efficacy;
13. PPB has continuously ensured that local manufacturers of pharmaceutical or medicinal products manufacture quality, safe and efficacious products by adhering to the laid down Guidelines for Good Manufacturing Practices (GMP). These include the EAC compendium on Good Manufacturing Practices;
14. overall there are forty-one local manufacturers of pharmaceuticals in Kenya. Of the forty-one: thirty (local manufacturers of pharmaceuticals complied with GMP requirement; five companies are implementing corrective actions and preventive actions; five are new companies at various stages of approval to start manufacturing and one company failed; and
15. the Board developed and implemented a policy document to guide the monitoring of adherence to guidelines on Good Manufacturing Practices during the COVID-19 pandemic.

## **2.5. Submissions from the Kenya Bureau of Standards**

At the 5<sup>th</sup> Joint Sitting held on Tuesday, 14<sup>th</sup> September, 2020 via the Zoom online meeting platform, the Standing Committee on Health and the Ad hoc Committee on the COVID-19 Situation met with the representatives of the Kenya Bureau of Standards. The Managing Director, KEBS, submitted as follows –

1. all products imported or locally manufactured were subjected to thorough quality checks and certification before they are allowed into the market. In 2020, a number of KEMSA consignments were accepted based on various criteria;
2. where goods were subjected to standards and failed to meet the minimum quality and performance requirements, such goods were rejected and re-shipped or destroyed at the owner's cost;
3. as provided for under Legal Notice No. 78 of 2020, (published on 28<sup>th</sup> April, 2020) a Pre-Export Verification of Conformity to Standards Program through which KEBS, in partnership with inspection agencies, ensure imported goods including COVID-19 prevention supplies are inspected, tested and certified at the country of supply to ensure that they meet quality and safety requirements;
4. the quality of locally manufactured products is assured through the KEBS Product Certification Scheme which is in line with ISO 17065 conformity assessment requirements for bodies certifying products, processes and services; The following number of firms have been certified-
  - a) Face masks KS 2636 – 121
  - b) Face Masks (N95) – 4
  - c) Coveralls – 63
  - d) Ventilators KPASS 2918 – 2
  - e) Sanitizers KS EAS 789-2013
  - f) Service disinfectants KS929 – 205; and
5. after certification, KEBS monitors the quality of the products in the market and the factory through market surveillance. Products found not conforming to the standard are withdrawn from the market and their permits to manufacture are withdrawn until corrective measures are put in place.

## **2.6. Submissions from the Council of Governors**

At the 6<sup>th</sup> Joint Sitting held on Wednesday, 16<sup>th</sup> September, 2020 via the Zoom online meeting platform, the Standing Committee on Health and the Ad hoc Committee on the

COVID-19 Situation met with the Council of Governors. The Chairman, H.E. Wycliffe Oparanya, responded to various queries raised by the Committee as follows-

**a) The ability of the County Governments to forecast and quantify the medical supplies and equipment required to be procured through KEMSA in response to COVID-19**

1. County Governments had in place trained and licensed pharmacists who were able to quantify and project the pharmaceutical and non-pharmaceutical commodities required by each county based on their disease burdens and consumption of commodities.

**b) The ability of KEMSA to supply products consistently and at the rate required by the County Governments without delay**

2. KEMSA had the logistics to supply commodities to the last mile. However, the supply of most commodities has not been consistent as there had been several cases where Counties have experienced commodity stock outs, particularly of Malaria (RDTs and AL 6) and HIV commodities and delays in deliveries spanning, two to three months;
3. there have been reports of slow response to emergency orders, particularly to the Frontier Counties;
4. KEMSA had been unable to provide 100% of the County orders with the prevailing fill rate ranging between 54-65% of all orders. This situation worsened by the UHC Pilot when KEMSA prioritized the 4 pilot Counties;
5. reports from County Governments show that KEMSA could not, on its own, supply all the products needed with existing correspondence with KEMSA pointing to unavailability of pharmaceutical and non-pharmaceutical products at the requested time thereby significantly compromising the delivery health service in the Counties.

**c) The quality of supplies and equipment procured through KEMSA**

KEMSA supplies reasonably good quality products to the Counties except in isolated cases where there have been complaints. These include the following incidences:

**i. Faulty Microscopes**

Microscopes procured and distributed by KEMSA in FY 2017/2018 under the GF Grant were faulty. The then PS, MoH, Eng. Peter Tum, who also chaired the Kenya Coordinating Mechanism (KCM) commissioned an assessment of the microscopes

which revealed that up to 25% of the microscopes supplied were substandard and faulty.

**ii. PPEs**

CoG received concerns from counties on the quality of PPEs supplied by KEMSA as follow—

- a) poor quality of some of the PPEs supplied including mis-labels i.e. some of the masks received were labelled non-medical, very thick masks affecting breathing for counties in ASAL areas where health care workers raised concerns that they were not user friendly. Some PPEs were noted to be porous and could allow fluids to get in to contact with health care workers while blue masks were of poor quality;
- b) PPEs were being supplied not as full kits but individual items hence making it possible to reach a high amount of one item and not another that may have been important; and
- c) delays in getting the ordered PPEs were also experienced despite assurance from MoH that they had a good supply. This affected distribution of PPEs to both COVID-19 hospitals and non-COVID-19 facilities and had continued to affect essential health services and covid-19 response provision. The total number of infected health care workers stood at 990 with 16 mortalities as in 35 counties as reported in daily situation report No. 180 of 13<sup>th</sup> September, 2020.

**d) Problems faced in meeting payments to KEMSA**

1. County governments faced challenges of shortfalls in their own source revenue collection. The reallocation of the available funds towards Covid-19 interventions left counties with limited resources to fund their functions as earlier planned in their annual budgets.
2. the county governments also made out payments on a priority basis and based on the available funds using the first in first out method in the clearance of pending bills. As at the end of FY 2019/2020 30th June 2020, counties owed KEMSA a total of Kshs. 234,242,551 out of the Kshs.13 billion previously owed in pending bills. Counties had essentially prioritized payment of KEMSA bills against total eligible pending bills.

**e) Other measures that the Counties may have put in place to ensure that they have adequate supplies or bridge any gaps with respect to the supplies by KEMSA**

It was submitted that counties had began procuring non-pharmaceuticals from sources other than KEMSA following the presidential directive issued in June, 2020 pending the amendment of the Kenya Medical Supplies Act to remove the requirement imposed on the National and County Governments to procure medical supplies solely from KEMSA.

**f) Other challenges faced by County Governments in the procurement of medical supplies**

1. County Governments experienced situations where KEMSA has supplied pharmaceutical and non-pharmaceutical products with a short shelf life forcing the counties to source for similar products in alternative companies whose shelf life is longer. As a result, the counties incurred losses as they were forced to destroy expired products and still pay for the same.
2. Amendments made to the Kenya Medical Supplies Authority Act of 2013 assented to by 13<sup>th</sup> May, 2019 and commenced on the 17<sup>th</sup> May, 2019, imposed a requirement for counties to procure drugs and medical supplies solely from the Kenya Medical Supplies Authority and further, imposed a fine of Kshs. 2,000,000 or term of imprisonment of five years or both for contravention. This, according to CoG put into jeopardy, the delivery of health services in view of the fact that KEMSA could not meet the supply demands of County Governments;
3. COG went to court to challenge the KEMSA amendments, the matter was consolidated with Senate petition seeking to challenge the constitutionality of various laws passed and assented to without the concurrence of the Senate. The matter was under consideration in High Court Petition No. 284 of 2019.

The chairperson, COG further noted that –

1. the amendments to the KEMSA Act make KEMSA a monopoly. Counties should be allowed to procure from other sources as long as there was value for money, noting that the cost of items bought from KEMSA are sometimes double the market cost as was noted to in the case of PPEs purchased through KEMSA cost Kshs. 12,000 whereas the same were sold for Kshs. 3,000;

2. the quality of items purchased through KEMSA had been a major challenge. KEBS is mandated to ensure standards of goods are acceptable and therefore, quality should not be used as an excuse to ensure that KEMSA maintains its monopoly;
3. the amendments to the KEMSA Act were made without consultations with the Council of Governors despite health being a devolved function under the Fourth Schedule of the Constitution; and
4. there was an urgent need to amend the KEMSA Act, to enable the counties to procure from other entities at better prices and quality e.g. MEDS.

#### **2.7. Submissions from the Public Procurement Regulatory Authority (PPRA)**

At the 5<sup>th</sup> Joint Sitting held on Wednesday, 23<sup>rd</sup> September, 2020, via the Zoom online meeting platform, the Standing Committee on Health and the Ad hoc Committee on the COVID-19 Situation met with PPRA. The Director General, Mr. Maurice Juma, submitted as follows-

1. PPRA had initiated an investigation into the tender processes undertaken by KEMSA pursuant to the provisions of section 35 of the PPADA with a focus on the tender processes that were undertaken for the procurement of COVID-19 related items;
2. out of one hundred and forty-one tenders of the first batch of the procurement documents that were to be submitted to PPRA, by the close of business on 5<sup>th</sup> August, 2020, only one hundred and sixteen documents were submitted on 13<sup>th</sup> August, 2020;
3. all tenders were processed through the direct procurement method;
4. most of the procurement proceedings were initiated pursuant to letters from MoH. Further, there was a letter Ref. No. MOH/ADM/1/1/171/ VIL. I (196) dated 15<sup>th</sup> April, 2020, by the PS, MoH, instructing KEMSA to disregard all other requests made in relation to COVID - 19 as they had been captured therein including the list items to be procured, their quantities, prices and firms to be invited;
5. The procurement proceedings were also initiated vide intent letters from the suppliers requesting to supply KEMSA with various Covid-19 related items. In response, the CEO, KEMSA, issued commitment letters with specific quantities, delivery dates and mode of acceptance stating that *"Supplies will be accepted using a delivery note as the other documents shall follow to facilitate payment."* Thus, all other procurement processes were executed retrospectively; and
6. KEMSA relied on section 69 of the PPADA to carry out procurement retrospectively, however, the process was flawed and should be investigated.

At the 13<sup>th</sup> Joint Sitting held on Wednesday, 7<sup>th</sup> October, 2020, the Committees received the final Report of the PPRA. The Committee was briefed as follows-

1. all the COVID-19 related tenders were processed through direct procurement;
2. the procurement proceedings were initiated vide intent letters from the suppliers requesting to supply KEMSA with various COVID-19 related items, following which the suppliers were issued with commitment letters with specific quantities, delivery dates, and mode of acceptance;
3. the commitment letters did not contain clear specifications of the items required to be supplied;
4. the procurement processes were executed retrospectively;
5. for most of the items procured, the awarded negotiated prices were based on letters from MoH and intent letters from suppliers;
6. there was no evidence of indicative market price indexes obtained through a market survey;
7. the product specifications provided by KEMSA to guide bidders were not competitively generated; and
8. there was no evidence of qualification criteria for the suppliers identified as strategic partners by the Government of Kenya through KEMSA.

Arising from this, the DG, informed the Committee that PPRA had arrived at the following conclusions –

- (i) the retrospective approvals of COVID-19 related procurement plans for FY 2019/2020, the choice of direct procurement as a method of procurement, and user requisitions complied with section 69(2) of the PPADA;
- (ii) the procurement proceedings were initiate pursuant to user requests by the Directorate of Commercial Services; and

(iii) there were various contraventions of the provisions of the PPADA by KEMSA and in particular, the CEO, KEMSA, in the procurement for goods during the period under review.

PPRA therefore made the following recommendations for consideration by the Committee –

- (a) there was need for further investigations into the processes through which the subject tenders were initiated by MoH and KEMSA;
- (b) there was need for further investigations into the receipt and distribution of all the COVID-19 related goods by KEMSA, specifically the Warehouse Management at Embakasi Warehouse;
- (c) there was need for investigations into the remaining twenty-three (23) COVID-19 related tenders which were not submitted by KEMSA to PPRA;
- (d) there was need for further investigation into the issuance of commitment letters by the CEO, KEMSA;
- (e) there was need for amendments to PPADA, 2015 to provide clarity on how the procedure for retrospective approval should be executed by a procuring entity; and to provide a procedure for implementation of sections 103(2) (b) & (c) of the Act;
- (f) KEMSA should ensure that the stocks are updated regularly to address the variances in the records; and
- (g) the ERP system that is utilized by KEMSA should be aligned to procurement processes.

#### **2.8. Submissions from the Ethics and Anti-Corruption Commission**

At the 5<sup>th</sup> Joint Sitting held on Wednesday, 23<sup>rd</sup> September, 2020 via the Zoom online meeting platform, the Standing Committee on Health and the Ad hoc Committee on the COVID-19 Situation met with the Ethics and Anti-Corruption Commission. The chairman of the Commission, Bishop (Rtd.) Eliud Wabukala, responded to various queries raised by the Committee as follows-

1. on 18<sup>th</sup> June, 2020, the EACC commenced an investigation into allegations relating to irregular procurement and fraudulent payments in the purchase and supply of COVID-19

emergency commodities at KEMSA by public officials that led to irregular expenditure of public funds to the tune of Kshs. 7.8 billion;

2. following a preliminary investigation, EACC identified and categorized the investigation to focus on both the demand and supply side of the contracts as follows–
  - (a) public officers alleged to be involved in the irregular procurement and payments by KEMSA; and
  - (b) suppliers alleged to have fraudulently and irregularly received public funds from KEMSA.
3. taking into consideration the voluminous documentation involved, the high number of suppliers and payment transactions, the Commission adopted a phased approach into the investigations;
4. in the 1<sup>st</sup> Phase of the investigation, EACC prioritized investigations relating to the alleged irregularities in the procurement and payments by public officers. A total of fifty-two persons of interest were interviewed and their statements recorded and documents relating to the procurement and payments were obtained for analysis;
5. on 16<sup>th</sup> September, 2020, three months from the date of inception of the investigation, EACC concluded the 1<sup>st</sup> Phase of the inquiry and submitted a report of the findings with appropriate recommendations to DPP pursuant to section 35 of the Anti-Corruption and Economic Crimes Act, 2003;
6. the investigation established criminal culpability on the part of public officials in the purchase and supply of COVID -19 emergency commodities at KEMSA that led to irregular expenditure of public funds and the Commission recommended charging of suspects, administrative action against some public officers, systems review of policies, procedures and practices at KEMSA to seal corruption loopholes;
7. EACC was awaiting the decision of the DPP upon his independent review of the inquiry file to inform any further action on the 1<sup>st</sup> Phase of the investigation;
8. EACC had embarked on the 2<sup>nd</sup> Phase of the investigation focusing on allegations of fraudulent and irregular payments to suppliers by KEMSA;
9. the 2<sup>nd</sup> Phase would be completed in clusters based on the nature of the deliveries, jurisdictions and amounts involved, since the awards, contracts and payments to the suppliers are distinct;

10. upon completion of the criminal investigation, EACC would forward its recommendations to the DPP and would initiate the civil recovery of public funds that may have been obtained by the suppliers through fraud;
11. EACC was in the process of investigating the whole procurement process at KEMSA during the COVID – 19 period including all persons involved in the process;
12. EACC was unable to divulge the names of the various individuals and information under investigation as this was likely to jeopardize the investigations which were still ongoing;
13. EACC gave an assurance to the Committee that the EACC was well seized of the various procurement irregularities and would provide its final report in due course;
14. EACC, before taking evidence from entities, would ensure that copies were available to the entities and hence this should not be used as an excuse by KEMSA or any entity under investigation not to provide information to Senate Committees;
15. PPRA had submitted its preliminary report to the EACC and its findings were under consideration by EACC; and
16. EACC assured the Committee that it was working expeditiously and without bias to complete the investigation as soon as possible.

#### **2.9. Submissions by the Kenya National Chamber of Commerce and Industry**

At the 10<sup>th</sup> Joint Sitting held on Thursday, 24<sup>th</sup> September, 2020 on the Zoom online meeting platform, the Standing Committee on Health and the Ad hoc Committee on the COVID-19 Situation met with the Kenya National Chamber of Commerce and Industry. The Vice-President, Dr. Eric Rutto, briefed the Committee as follows-

1. KNCCI was pleased by the proclamation by the CS, MoH on 18<sup>th</sup> June, 2020 regarding the promotion of local manufacturing;
2. KNCCI has been at the forefront in proposing both short and long term measures to support the micro, small and medium enterprises particularly at the county level to continue with their business activities with minimal interruptions to ensure sustainability;
3. in support of the “Buy Kenya Build Kenya Initiative”, KNCCI has been in discussion with the MoH on an initiative to support local manufacture of re-usable facemasks through the identification of producers and manufacturers who can provide the service;

4. KNCCI began its mobilization process on 25<sup>th</sup> June, 2020 upon receipt of specification from the MoH through a letter and involved outreach to all the forty-seven counties requesting for names of local manufacturers of local reusable face masks;
5. KNCCI engaged with the MoH and stakeholders on the manufacture of re-usable face masks from June, 2020 and the Chamber President met with KEMSA on 4<sup>th</sup> September, 2020, to provide progress on the same;
6. on 17<sup>th</sup> September, 2020, samples were received and delivered to KEMSA and on 18<sup>th</sup> September, 2020, KNCCI received a letter from the MoH to KEMSA on revised standards with respect to re-usable face masks;
7. the KNCCI filled tender documents but is yet to enter into any contract with KEMSA;
8. KEBS developed the standards for the re-usable face masks, as such the KNCCI did not involve PPB. However, if required, the KNCCI was willing to engage with PPB;
9. the provision of the re-usable face-masks followed a proclamation of the CS, MoH, at a meeting presided over by His Excellency the President held on 18<sup>th</sup> June, 2020, and was therefore not unsolicited;
10. KNCCI plays the role of protecting the interests of its members as well as lobbying for opportunities for its members. KNCCI is not trading in its own name rather it is mobilizing its membership to trade locally and internationally; and
11. the KNCCI Memorandum and Articles of Association and the Code of Conduct and Ethics guide the conduct of its membership. Upon receipt of evidence, KNCCI has in place relevant mechanisms to carry out disciplinary measures with respect to its membership.

## **2.10 Submissions from the Suppliers**

### **2.10.1 Submissions from Angelica Medical Supplies Limited**

At a meeting held on 2<sup>nd</sup> December, 2020, the Standing Committee on Health met with the Directors of the Angelica Medical Supplies Limited who briefed the Committee as follows-

1. the company had had over two decades of engagements with KEMSA and other similar regional bodies and in particular, it had twenty-three years' experience in the supply of medical equipment and products;
2. with regard to the procurement process, the company wrote to KEMSA informing them of the items that they had available in stock in response to the COVID-19 pandemic. KEMSA proceeded to issue the company with a commitment letter for the supply of the items it had in stock;
3. the company was not aware of the specific items KEMSA required, the organization sent out generic letters to various healthcare providers and stores that it had worked with previously to supply various items in response to COVID-19;
4. the company has no practice of initiating procurement processes with KEMSA;
5. with regard to pricing of items, the company indicated the prices at which it would supply the items in its letter of intent to KEMSA; the company provided an offer price from the database;
6. negotiations were done with KEMSA on pricing of items. KEMSA invited the company for price negotiations on the quoted tender prices; the company reviewed their prices and gave KEMSA a revised agreed schedule of prices as per the agreement during the negotiations as set out in the negotiation minutes which were in the custody of KEMSA;
7. the negotiations were carried after the items had been delivered and were hence undertaken as a mere formality;
8. the medical equipment was required to be supplied as per the samples approved by KEMSA;
9. the PPB import permit was applied in accordance with ICMS (Integrated Customs Management System) Certificates of conformity were issued as per the standards act guidelines;
10. the company submitted samples for testing to KEMSA;
11. the company also paid taxes on all items supplied to KEMSA as per customs guidelines;
12. the tendering process had been followed with the chronology of events being as follows-
  - (a) submission of intent to supply the COVID-19 by Angelica;

- (b) issuance of commitment letters by KEMSA;
- (c) submission of samples for evaluation and approval by Angelica and KEMSA;
- (d) delivery of goods to KEMSA warehouse;
- (e) invitation to tender was issued by KEMSA;
- (f) submission of tender documents by Angelica;
- (g) invitation for price negotiations by KEMSA;
- (h) notification of award by KEMSA;
- (i) award acceptance and contract signing;
- (j) issuance of Local Purchase Orders (LPOs) by KEMSA;
- (k) submission of invoices by Angelica; and
- (l) installation and commissioning of equipment at hospitals; and

13. the Company had been partially paid by KEMSA.

#### **2.10.2 Submissions from Bell Industries Limited**

At the 16<sup>th</sup> Sitting held on 14<sup>th</sup> December, 2021, the Committee on Health met with the Executive Director, Bell Industries Limited, who submitted as follows-

1. the Company began business with KEMSA in 2015 and had been pre-qualified to supply KEMSA annually since then;
2. at the height of the COVID-19 pandemic, word was all over the media that there was a shortage of PPEs in the country; he therefore visited the procurement department at KEMSA to seek information on how the company could supply the required items;
3. the procedure given was that for the company to supply COVID-19 related items, the company was required to write a letter of intent to KEMSA and provide samples of items the company intended to supply;
4. the company supplied PPEs at Kshs. 12,000 per pair but following negotiations the price came to Kshs. 8,500; thermos-guns were priced at Kshs. 10,000 but following

negotiations, the price reduced to 8,500 after which the company received an LPO from KEMSA;

5. the company had been partially paid by KEMSA, approximately 30% of the total amount was outstanding; and
6. KEMSA would be better placed to respond to questions on the tendering process.

### **2.10.3 Submissions from Shop N Buy Limited**

At its sittings, held on 2<sup>nd</sup> December, 2020 and 7<sup>th</sup> December, 2020 respectively the Committee met with the Director, Shop N Buy Limited. The following information was provided to the Committee-

1. the Company had no engagements with KEMSA prior to the outbreak of the COVID-19 pandemic in the supply of various medical items;
2. the Company had about four months' experience in the supply of medical equipment and products;
3. the procurement process was initiated through a letter of intent to supply dated 29<sup>th</sup> April, 2020; the company initiated the procurement process;
4. the Company had customers it dealt with who in turn sold items to KEMSA and with this information the company wrote to KEMSA on its intent to be one of their suppliers during the COVID-19 pandemic;
5. the company wrote to KEMSA stating prices for various items it had in stock and KEMSA accepted to be supplied at the quoted prices through a commitment letter dated 30<sup>th</sup> April, 2020;
6. the company did not hold any negotiations for the price of items to be supplied with KEMSA;
7. through samples delivered on 29<sup>th</sup> April, 2020, alongside the letter of intent to supply, an agreement was reached on the quality standards of items to be procured prior to delivery;
8. the company has met its tax obligations for all items supplied to KEMSA;
9. KEBS certification for one of the company's local suppliers who also receives goods from the company's Chinese agents Tekwise Limited and Carrier Logistics was provided

to the Committee; the PPEs the company supplied were exactly from this same batch whose certification is provided;

10. during the pandemic, the responsibility of freight and clearing fell on the suppliers of the company carrier logistics China and Tekwise Logistics China in conjunction with their local clearing agent JOPUKA in Kenya. This was also necessitated by shortage of flights leading to consolidation of cargo by the Company's suppliers clearing agent JOPUKA Limited; and
11. samples were submitted for inspection by KEMSA prior to delivery and the deliveries were checked to confirm compliance to sample requirements.

The company submitted via email all documents relating to engagements with Edumart Enterprises Limited and Bennetts Ventures Limited including delivery notes, invoices, cheques, bank agreements; as well as agreements with suppliers and delivery notes for the supplier's local agent JOPUKA Limited as well as payments made to the suppliers in China. The Company also submitted documents in relation to Tekwise Limited and Carrier Logistics the suppliers and freighters from China.

#### **2.10.4 Submissions from Briema Grains Stores Limited**

At a meeting held on 11<sup>th</sup> December, 2020, the Committee met with the Director, Briema Grains Stores Limited, who submitted as follows-

1. following the declaration of the COVID-19 pandemic in the country and the subsequent closure of the borders of country by the President, the company realized that the economy was on the verge of closure due to the increased number of COVID-19 infections and resolved to engage in the provision of PPEs which were urgently required in the country. the Company sourced the items from the local suppliers and resold them to the market;
2. the company learnt through the media that the government was in urgent need of PPEs and therefore wrote to an application (letter of intent) to KEMSA dated 21<sup>st</sup> April, 2020, specifying items the company could supply;
3. the company received a commitment letter dated 28<sup>th</sup> April, 2020, for the supply and delivery of 200,000 pieces of KN-95 Masks, and 4<sup>th</sup> May, 2020 received a commitment letter for the supply of 6000 (packs of 50s) Surgical masks 3 ply as an emergency response to the COVID-19 pandemic;

4. delivery of the items was to be made by 8<sup>th</sup> May, 2020, and the goods were duly delivered on the said date;
5. through a letter dated 27<sup>th</sup> May, 2020, the company was invited to submit a bid for the supply of the KN-95 face masks and 3 ply surgical masks as per bid documents submitted on 29<sup>th</sup> May, 2020;
6. the company was later invited for negotiations, whereupon a minimum price was agreed on and confirmed on 2<sup>nd</sup> June, 2020. KEMSA then issued the local purchase order and the company then invoiced KEMSA on 8<sup>th</sup> June, 2020 as follows-

**Table 8: Description of items procured with respect to Briema Grain Stores Limited**

No.	Item description	UoM	Quantity	Unit price	Total Price (Kshs)
1.	KN-95 Respirator Face Mask	Piece	200,000	700	140,000,000
2.	Surgical Face Mask 3 ply ear Loop	Pack of 50s	6,000	4500	27,000,000
					<b>167,000,000</b>

7. the Company acknowledged receipt of notification of award dated 12<sup>th</sup> June, 2020 on the supply of the agreed items and the offer was accepted on 15<sup>th</sup> June, 2020. The contract was subsequently signed on 22<sup>nd</sup> June, 2020;
8. payment for the supplied items as per the local purchase order was effected on 17<sup>th</sup> July, 2020;
9. the company had never supplied KEMSA with any items prior to the declaration of the COVID-19 pandemic;

10. the company negotiated with KEMSA on the prices of items prior to deliver;
11. the company discussed the standard and quality of items to be supplied to KEMSA; for instance, only the 3 ply face masks were to be supplied;
12. the company sourced for the items locally and therefore did not require an import licence; and
13. the information on the COVID-19 pandemic and the need for supply of masks to the Ministry was in the public domain and in the media.

## CHAPTER 3 - ANALYSIS OF DOCUMENTS AND SUBMISSIONS MADE BEFORE THE COMMITTEE

The Committee pursuant to its mandate, analysed the documentation presented and the submissions made before it by the various parties:

### 3.1 Oversight role of the Ministry of Health

Section 4(2) of the Kenya Medical Supplies Authority Act, 2013, provides as follows—

*(2) The Cabinet Secretary shall, in consultation with the Authority and the appropriate county government organs, determine the requirement of drugs and medical supplies in public health facilities.*

Section 12 of the State Corporations Act provides that “no state corporation shall, without the prior approval in writing of the Minister and the Treasury, incur any expenditure for which provision has not been made in an annual estimate prepared and approved in accordance with section 11 of the Act”.

Section 16(1) as read together with section 16(3) of the Kenya Medical Supplies Authority Act further provides that —

*(1) At least three months before the commencement of each financial year, the Board shall cause to be prepared estimates of the revenue and expenditure of the Authority for that year.*

*(2) ...*

*(3) The annual estimates shall be approved by the Board before the commencement of the financial year to which they relate and shall be submitted to the Cabinet Secretary for approval and after the Cabinet Secretary's approval, the Board shall not increase the annual estimates of the Authority without the consent of the Cabinet Secretary.*

Dr. Susan Mochache, PS, MoH, in her submissions to the Committee on 11<sup>th</sup> August, 2020, stated that the role of MoH with respect to the procurement of PPEs and testing kits, included

–

- (a) the development of procurement lists and specifications for GoK, World Bank, GAVI and GF funding procurements;
- (b) the submission of the procurement lists for funding to the National Treasury for approval and submission to KEMSA;
- (c) the receipt of donations and submission to KEMSA for warehousing and distribution in line with the distribution lists developed by MoH;
- (d) monitoring of the distributions;
- (e) payment to KEMSA for the warehousing and distribution of donations on submission of invoices; and
- (f) monitor the quality of donations in collaboration with PPB.

The Committee noted that the role of MoH was consistent with section 4(3) of the Kenya Medical Supplies Authority Act, 2013, required the National and county governments to undertake the procurement of drugs and medical supplies through KEMSA as follows –

*(3) A national or county public health facility shall, in the procurement and distribution of drugs and medical supplies, obtain all such drugs and medical supplies from the Authority subject to –*

- (a) the drug being duly registered by the Board; and*
- (b) the drugs and medical supplies meet the standards of quality and are efficacious as authorized by the Board.*

The Committee noted that section 3 of the Kenya Medical Supplies Authority Act, 2013, establishes KEMSA as a body corporate giving it quasi-independence from MoH in the performance of its functions. Therefore, whereas MoH is required to formulate policies for the implementation by, and carry out oversight over, various agencies under its purview, its oversight role does not extend to managing the actual carrying out of the functions of

KEMSA. The Committee further noted that MoH has a converse relationship as a client of the Authority given that the Authority procures, warehouses and distributes drugs and medical supplies for MoH as happened during the Covid-19 Pandemic.

From the submissions made to the Committee by the PS, MoH, and the chairperson and CEO, KEMSA, the Committee noted that KEMSA was required to undertake procurements based on the procurement lists prepared by MoH pursuant to section 4(2) of the Kenya Medical Supplies Authority Act and further, distribute the items based on the distribution lists submitted to KEMSA by MoH. The Committee further noted the submissions by Hon. Kembi-Gitura, chairperson to KEMSA, that the National Government was amongst the partners that KEMSA worked with and further, that all they did was to procure, warehouse and distribute various supplies for the Government at a fee.

#### **Committee observations**

The Committee observed that the procurement lists prepared by MoH were required to be done in line with the procurement needs identified by MoH and to be in tandem with the budgetary allocations assigned to MoH by the National Treasury. The Committee further noted, from the submission of the Auditor General in her report to the Committee that as at 31<sup>st</sup> July, 2020, Kshs. 3,013,530,583 had been disbursed to KEMSA by MoH through a supplementary budget to finance the procurement of COVID-19 related items while Kshs. 13,047,073,199 was disbursed to finance the UHC programme. Whereas the Committee found that MoH had disbursed the monies in line with the budgetary allocations, it noted that KEMSA carried out procurements that fell outside the purpose for which the monies had been allocated. The Committee further established, during the meeting held on 28<sup>th</sup> August, 2020 with KEMSA, that --

- (a) Dr. Manjari, the CEO, KEMSA, had made a request directly to the PS, MoH vide a letter dated 12<sup>th</sup> June, 2020, seeking approval to utilise the UHC funds to cater for expenses incurred in the procurement of COVID-19 related items without first seeking the approval of the board (Annex6);
- (b) the CEO, KEMSA, bypassed the Board and wrote directly to the PS, MoH, seeking a request to utilise the UHC funds to finance the COVID-19 procurements;
- (c) the PS, MoH, declined the request;

- (d) despite the decline by the PS, MoH, KEMSA still utilised the funds contrary to the directions of the PS, MoH; and
- (e) the chairperson, KEMSA, subsequently wrote a letter to the CS, MoH dated 20<sup>th</sup> August, 2020 indicating that KEMSA had utilised the monies intended for the UHC programme to undertake COVID-19 related procurements (Annex 7).

The Committee observed that there was need for better oversight, by MoH over KEMSA. In noting that KEMSA was a critical component within the health sector, the Committee observed that the CS, MoH, and the PS, MoH, needed to ensure that there was in place, an effective reporting and feedback mechanism between MoH and KEMSA that enables accountability in line with the functions conferred on KEMSA under section 4(1) of the KEMSA Act which requires KEMSA to, inter alia –

*(d) collect information and provide regular reports to the national and county governments on the status and cost-effectiveness of procurement, the distribution and value of prescribed essential medical supplies delivered to health facilities, stock status and on any other aspects of supply system status and performance which may be required by stakeholders.*

In this case, the Committee observed that the Board of KEMSA and MoH were only engaged after the irregularities had taken place therefore putting the realization of the objectives of KEMSA and the programmes that were in place into jeopardy and in-turn affecting the implementation of the policy objectives of the National Government. The Committee further observed that this also meant that MoH and the Board of KEMSA could not take immediate action to remedy the situation but were only involved after the procurements had been undertaken resulting in a reactive, instead of preventive or pro-active resolution to the issues at hand.

The Committee observed that there was lack of proper coordination between the CS, MoH, PS, MoH, and the Board and management of KEMSA and lack of convergence of the action to be taken in light of the pandemic and the need to procure COVID-19 related items on an emergency basis.

### 3.2 Oversight role of the Board of KEMSA

Section 15(1) of the State Corporations Act provides that “*a board shall be responsible for the proper management of the affairs of a state corporation and shall be accountable for the moneys, the financial business and the management of a state corporation*”.

Section 6 of the Kenya Medical Supplies Authority Act confers on the Board the powers necessary for the performance of the functions of the Authority under the Act and in particular, powers to, *inter alia*—

- (a) control, supervise and administer the assets of the Authority in such manner as best promotes the purpose for which the Authority is established;*
- (b) determine the provisions to be made for capital and recurrent expenditure and for the reserves of the Authority;*
- (c) receive any grants, gifts, donations or endowments and make legitimate disbursements there from; and*
- (d) incorporate, develop and operate a division or subsidiary of the Authority for the procurement, storage and supply of medical supplies to health facilities and institutions on a competitive and commercial basis but such commercial service shall be conducted without prejudice to the ordinary non-commercial supply system to public facilities.*

Section 8 of the Kenya Medical Supplies Authority Act further provides for the appointment of the CEO of KEMSA by the Board and requires the CEO to be responsible for the—

- (i) day to day running and operation of the Authority;*
- (ii) administration, organization and control of staff of the Authority;*
- (iii) management of funds, property and affairs of the Authority;*
- (iv) implementation of policies and programmes of the Authority and reporting thereon to the Board;*
- (v) development of operational plans for achieving the objectives of the Authority;*  
*and*
- (vi) performance of any other function necessary for the implementation of this Act, as may be determined by the Board.*

Section 19(1) of the Kenya Medical Supplies Authority Act, 2013, further makes provision for the manner in which KEMSA is required to undertake its functions as follows –

*(1) In discharging its functions under this Act the Authority shall put into place measures to ensure—*

- (a) maximum efficiencies;*
- (b) benefit from economies of scale;*
- (c) efficacy, safety, quality and affordability of drugs and medical supplies procured;*
- (d) a steady supply of drugs and medical supplies to public health facilities;*
- (e) maintenance and sustenance of strategic reserves of essential medicines and medical supplies;*
- (f) application of sound commercial principles in the procurement, storage and distribution of drugs and other medical supplies;*
- (g) the carrying out of technical or laboratory analysis of drugs and medical supplies to determine their suitability for procurement, use, storage or disposal by the Authority so as to ensure their compliance with the standards set by the relevant law;*
- (h) timely distribution of drugs and medical supplies to health facilities;*
- (i) a feedback mechanism to its consumers;*
- (j) an effective monitoring and evaluation mechanism; and*
- (k) availability of information relating to its operations.*

The Mwongozo: Code of Governance for State Corporations (*Mwongozo*) provides the following governance practice with respect to the roles and functions of a board of a state corporation –

*The Board should—*

- (a) exercise their role collectively and not individually;*
- (b) determine the organization's mission, vision, purpose and core values;*
- (c) set and oversee the overall strategy and approve significant policies of the organization;*

- (d) ensure that the strategy is aligned with the purpose of the organization and the legitimate interests and expectations of its shareholders and other stakeholders;
- (e) ensure that the strategy of the organization is aligned to the long term goals of the organization on sustainability so as not to compromise the ability of future generations to meet their own needs;
- (f) approve the organizational structure;
- (g) approve the annual budget of the organization;
- (h) monitor the organization's performance and ensure sustainability;
- (i) enhance the corporate image of the organization;
- (j) ensure availability of adequate resources for the achievement of the organization's objectives;
- (k) hire the CEO, on such terms and conditions of service as may be approved by the relevant government organ(s) and approve the appointment of senior management staff; and
- (l) ensure effective communication with stakeholders.

The Mwongozo further provides as follows with respect to the role of the CEO of a state corporation –

*The CEO shall—*

- (a) be responsible for the day-to-day operations of the organization;
- (b) provide leadership to senior management and staff;
- (c) prepare the annual budgets and establish proper internal controls;
- (d) be responsible for the execution and communication of the Board's strategies, decisions and policies;
- (e) develop and recommend to the Board the annual business plans for the organization;
- (f) ensure that the organization has an effective management structure including succession plans;
- (g) ensure that all Board papers are accurately written, are relevant and are availed to the Board members in good time;
- (h) serve as the link between the Board and the Management;
- (i) be responsible for the achievement of the objectives of the organizations;
- (j) put in place effective administrative structures, processes and systems;

- (k) provide regular, thorough and prompt communication to the Board on key technical, financial and administrative matters; and*
- (l) be responsible for stakeholder management and the enhancement of the corporate image of the organization.*

In his submissions to the Committee during the meeting held on 28<sup>th</sup> August, 2020, the chairperson, KEMSA, stated that the Board of KEMSA played a supervisory role and that its principle function was to give directions to the board of directors in the carrying out of its functions. He informed the Committee that the Board of KEMSA also approved the budget and the procurement plan at the beginning of the financial year but did not certify or approve the individual procurements that were undertaken by the entity as the Board. This, he informed the Committee was due to the fact that the Board of KEMSA did not micromanage the board of directors in the carrying out of its work but rather, the board of directors was required to undertake its work and submit reports to the Board.

The CEO, KEMSA, also informed the Committee that KEMSA held board updates through committees and full board meetings during which the CEO, KEMSA, would inform the Board on the day to day happenings through the committees. He further informed the Committee that—

- (a) the Board of KEMSA was aware of all procurements and sources of funds in KEMSA;
- (b) the Board of KEMSA approved the budget and the procurement plan as prepared by the board of management upon which the board of management was to implement;
- (c) the CEO, KEMSA, approved the procurement of medical items beyond and without an approved budget owing to the emergency;
- (d) at the time COVID-19 was declared an emergency, there was no budgetary provision for the procurement of COVID-19 related items; and
- (e) that the CEO, KEMSA, had not sought the approval of the Board of KEMSA regarding the procurements which fell beyond the approved budget.

The Committee noted the submissions by the chairperson, KEMSA, that no budget existed at the time for the procurement of COVID-19 related items as the same was declared a

pandemic three months towards the end of the financial. The Committee also noted that the Board of KEMSA was not aware that the budget had been exceeded nor had any consent or resolution been made that the budget be exceeded. The Committee further noted that despite the advice by the Director of Procurement vide memos issued in April, May and June, 2020 (Annex 8), to cease carrying out the procurements until there were adequate funds available, the CEO, KEMSA, still continued with the issuance of commitment letters. However, the chairperson, KEMSA, informed the Committee that he was not aware of the memo by the Director, Procurement advising on the stoppage of the procurements until after the investigations had started. The chairperson, informed the Committee that the Board of KEMSA only knew that the budget had been exceeded when the management requested the Board of KEMSA to approve a further budget so that they could pay the debts that had been incurred in the procurement of PPEs.

#### **Committee observations**

From the foregoing, it was clear to the Committee that the role of the board of KEMSA is to have oversight over the Authority. It is required to provide strategic and policy leadership to the Authority and further provides budgetary oversight over the Authority.

The Committee observed that in order for the Authority to carry out its functions effectively, the board of management is required to implement the directives of the Board of KEMSA in line with the existing legislation and ensure that they keep the Board apprised on the activities undertaken by it. In addition, the Board of KEMSA is required to exercise effective oversight over the board of management to ensure the implementation of its directives and carrying out of the functions in line with the policies and directives of the Board of KEMSA.

The Committee found that there was a disconnect between the Board of KEMSA, the CEO, KEMSA, and the board of management and in particular, the lack of timely reporting on the part of the CEO, KEMSA particularly with respect to the utilization of funds for the procurement of COVID-19 related supplies. There was also lack of adherence to the reporting structures on the part of the CEO, KEMSA, who, rather than request, through the Board of KEMSA, for directions regarding the need for additional financing to undertake the procurements that fell outside the approved procurement plans and budget made the

executive decision to proceed with the procurements and only sought approval after the issuance of commitment letters.

The Committee found that the Board of KEMSA was not consulted with respect to the commitment letters and subsequent procurement processes that were undertaken without an existing budget KEMSA's existing financial situation thereby failing in their fiduciary duty. As a result, the Committee observed that the CEO, KEMSA, acted in a manner that was counter-productive and that was contrary to section 8(3)(iv) of the Kenya Medical Supplies Authority Act as well as the *Mwongozo* in ensuring that the Authority met its obligations under section 6 of the Act.

The Committee observed that the CEO, KEMSA, took advantage of the disconnect and lack of an effective oversight mechanism to undertake the procurement of COVID-19 related items without an existing budget and beyond the KEMSA capital budget. In addition, the Committee found that the Board of KEMSA ought to have reprimanded the CEO, KEMSA, for failing to adhere to the PPADA and further, for failing to report to the Board.

The Committee also found, in its analysis, that the measures required to be put in place under section 19(1) of the KEMSA Act to ensure "*maximum efficiencies, efficacy, safety, quality and affordability of drugs and medical supplies procured, application of sound commercial principles in the procurement, storage and distribution of drugs and other medical supplies, an effective monitoring and evaluation mechanism*" were inadequate given the fact that the procurements were carried out without the necessary budget and knowledge by the Board of KEMSA. In addition, the Committee found that KEMSA did not have in place, adequate mechanisms to ensure the uninterrupted supply of drugs and other medical supplies in the case of an emergency situation as was the case during the COVID-19 pandemic.

### **3.3 Budget and financing for purposes of COVID-19**

Article 227 of the Constitution imposes an obligation on every public entity to carry out its processes for the procurement of goods and services in a manner that is equitable and transparent as follows –

*(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.*

Section 44 of the PPADA requires an account officer of a public entity to “ensure that procurement of goods, works and services of the public entity are within the approved budget of that entity”. In addition, section 45(3) of the PPADA requires the procurement processes of an entity to be carried out within the limits of an approved budget as follows–

*(3) All procurement processes shall be–*

*(a) within the approved budget of the procuring entity and shall be planned by the procuring entity concerned through an annual procurement plan;*

*(b) undertaken by a procuring entity as per the threshold matrix prescribed; and*

*(c) undertaken in strict adherence to Article 227 of the Constitution.*

The Committee noted that the purchase of medical supplies procured in response to COVID-19 were financed using the KEMSA capital budget, funds allocated for purposes of the UHC programme and monies from MoH appropriated for the purchase of the said items and received from the World Bank to support the Government in its response to COVID-19. The Committee further noted various issues arising regarding the use of the funds in the procurement of COVID-19 related items as follows –

### **3.3.1 KEMSA Capital Budget**

In his submissions to the Committee during the meeting held on 28<sup>th</sup> August, 2020, the chairperson, KEMSA, stated that monies for the procurement of commodities to deal with COVID-19 were availed through the National Government and KEMSA’s own capital. He informed the Committee that the monies received from MoH were utilised for the purpose for which they had been obtained while the KEMSA capital was used to procure COVID-19 related items. The chairperson further informed the Committee that monies received by KEMSA from GF and USAID were not used for the procurement of supplies for purposes of

COVID-19 but for the prevention and treatment of Malaria, Tuberculosis and HIV/AIDS and for matters nutrition respectively.

The chairperson, KEMSA, informed the Committee that the approved budget for FY 2019/2020 was Kshs. 4.655 billion and that the budget was approved at the beginning of FY 2019/2020. He however stated that this budget did not cover the procurement of COVID-19 related items but rather only HPTs which KEMSA procured in their day to day business. He further informed the Committee that COVID-19 was only declared a pandemic in March, 2020, months after the budget and procurement plan had been approved by the Board and in particular, three months towards the end of FY 2019/2020.

The Auditor General submitted her report to the Committee on 30<sup>th</sup> September, 2020, and confirmed to the Committee that the total capital budget for KEMSA was Kshs. 4,655,709,000 which was based on the procurement plan for FY 2019/2020. The monies were meant to finance the procurement of pharmaceuticals totalling Kshs. 2,935,424,524 and non-pharmaceuticals totalling Kshs. 1,720,284,476. The budget was to be financed through the sale of pharmaceuticals and non-pharmaceutical commodities. The Auditor General noted that the Board approved the budget on 24<sup>th</sup> January, 2019 vide minute number 4/FB/2019 but no information was submitted evidencing the approval of the budget by the CS, MoH or the National Treasury contrary to section 16(3) of the KEMSA Act and paragraph 3 of the Guidelines for the preparation of the Annual Budget for State Corporation for Financial year 2019/2020 and Medium-Term Projections for FYs 2020/2021 and 2021/2022, National Treasury Circular No. 14 of 2018 which provides that –

*The calendar for the preparation of the FY 2019/2020 Annual Budget has been aligned to the timelines for the National Budget. In this regard, State Corporations are required to submit their Annual Budgets for FY 2019/2020 and projections for FYs 2020/2021 and 2021/2022 to their line ministries and the National Treasury and Planning, not later than 31st January, 2019 for approval.*

The Committee also noted the findings of the Auditor General that the KEMSA capital budget for FY 2019/2020 did not have an allocation for the procurement of COVID-19 related items.

### 3.3.2 Allocations by the Ministry of Health

The Committee noted, from its analysis of the documents submitted by KEMSA and the Auditor General to the Committee, that the monies subsequently allocated by MoH to KEMSA through a supplementary budget to finance the procurement of various HPTs during the period under review were as follows –

**Table 9: Allocations by MoH to KEMSA for the procurement of HPTs**

No.	Particulars	Amount (Kshs.)
1.	UHC Programme	13,047,074,119
2.	COVID-19 related activities	3,013,530,583
3.	Tax on USAID procured HTP	333,470,837
	<b>Total</b>	<b>16,394,074,539</b>

The Auditor General further noted that the specific sources of the allocation by MoH to KEMSA of Kshs. 3,013,530,583 for the COVID-19 related expenditure undertaken through the supplementary budget were as follows –

**Table 10: Allocations for COVID-19 related expenditure by KEMSA**

No.	Source of funds	Sub-head	Allocation to KEMSA (Kshs.)	Amount received by the time of the audit
1.	World Bank	CERC-Transforming Health systems Project (THS)	758,690,583	304,160,118
2.	World Bank	Kenya COVID-19 emergency response project (CHERP)	454,840,000	77,774,400
3.	Government of Kenya	Procurement of test kits and reagents	1,500,000,000	1,500,000,000
4.	Government of Kenya	Supply of facemask to vulnerable groups	300,000,000	300,000,000
			<b>3,013,530,583</b>	<b>2,181,934,518</b>

The Committee also took note of the allocation by MoH to KEMSA of Kshs. 13,047,073,119 to finance the UHC programme as follows –

**Table 11: Allocations to KEMSA for the UHC programme**

No.	Particulars	Amount (Kshs.)	Date received
1.	UHC	4,034,382,278	11 <sup>th</sup> March, 2020
2.	UHC	2,682,852,853	11 <sup>th</sup> June, 2020
3.	UHC	1,802,997,660	11 <sup>th</sup> June, 2020
4.	Amount requested by KEMSA for purchase of medical equipment under UHC but declined by MOH and deferred to FY 2020/2021		Not received as at the time of the audit
	<b>Total</b>	<b>13,047,073,119</b>	

The Auditor General informed the Committee that although the records at the National Treasury indicated that Kshs. 2,682,852,853 (item 2 in table 3) and Kshs. 1,802,997,660 (item 3 in table 3) had been disbursed to MoH for COVID-19 related activities at KEMSA, the Auditor General found that the records at KEMSA and MoH revealed that the funds were disbursed for UHC and KEMSA Tax on USAID procured HPTs and that a further inquiry would need to be undertaken to verify the true position of the utilisation of the funds.

### 3.3.3 Utilization of KEMSA capital funds and allocations by MoH to finance the procurement of COVID-19 related items

Section 44 of the PPADA imposes an obligation on an accounting officer of a procurement entity to, among other things –

- (a) ensure that procurement of goods, works and services of the public entity are within the approved budget of that entity;...*

In addition, section 53(8) of the PPADA provides as follows –

- (8) Accounting officer shall not commence any procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.*

The Committee also took note of regulation 43(b) of the Public Finance Management (National Government) Regulations, 2015, which requires an accounting officer to “ensure

*that public funds entrusted to their care are properly safeguarded and are applied for purposes for only which they were intended and appropriated by the National Assembly”.*

The Committee noted that KEMSA did not have a budgetary allocation for the procurement of COVID-19 items during FY 2019/2020 and that despite this, KEMSA went ahead to carry out the said procurements on account of the fact that COVID-19 was a pandemic that required the urgent procurement of medical supplies. The Committee, in reviewing the tender documentation submitted by KEMSA, observed that the commitment letters issued, and procurements subsequently undertaken by KEMSA for purposes of COVID-19, exceeded the KEMSA capital budget of Kshs. 4.65 billion. In particular, the Committee took note of the Auditor General’s findings that the procurements for COVID-19 related items amounting to Kshs. 7,632,068,588 were funded from the KEMSA capital budget out of which Kshs. 4,712,869,916 had been paid at the time of carrying out the audit. The particulars of the findings by the Auditor-General with respect to the utilisation of funds allocated by the MoH were as follows—

**Table 12: Utilization of funds by KEMSA for COVID-19 related expenditures under various budget items**

No.	Source of funds	Project	Approved COVID-19 budget (Kshs.)	Amount incurred (Kshs.)
1.	KEMSA UHC and KEMSA capital budget	UHC	0	7,632,068,588
2.	World Bank	CERC-Transforming Health systems Project (THS)	758,690,583	304,160,118
3.	World Bank	Kenya COVID-19 emergency response project (CHERP)	454,840,000	452,644,000 (purchased Abbot-Time SARS COV-2 test kits, PCR test and extraction kits and virus transport media)
4.	Government of Kenya	Procurement of test kits and reagents	1,500,000,000	0
5.	Government of Kenya	Supply of facemask to vulnerable groups	300,000,000	0

The Committee also took note of the Auditor General's submission to the Committee that no evidence was found, from the documents submitted by KEMSA for purposes of the audit, of the approval by the Board of KEMSA of the re-allocation of the KEMSA capital budget or a request for a supplementary budget to undertake procurements in response to the COVID-19 pandemic.

During the meeting of the Committee held on 28<sup>th</sup> August, 2020, with the board of management of KEMSA, the Committee noted that the Director, Procurement, had written a memo dated 24<sup>th</sup> April, 2020 to the CEO, KEMSA, advising that KEMSA had carried out direct procurements to the tune of Kshs. 4 billion against KEMSA's budget of Kshs. 4.655 billion. The Committee further noted that the Director, Procurement, issued another warning to the CEO, KEMSA in May, 2020, and June, 2020, requesting the CEO, KEMSA not to proceed with direct procurements as KEMSA had made commitments to the tune of Kshs. 5.2 billion in May and subsequently Kshs. 7.6 billion in June, 2020, beyond KEMSA's capital budget of Kshs. 4.655 billion. In particular, the Committee noted the advice of the Director of Procurement dated 29<sup>th</sup> June, 2020, regarding the proposed procurement of PPE Kits from Kilig Limited. In this memo, the Director advised the CEO, KEMSA to shelve the proposed procurement until adequate finances were available. The Committee however noted that despite the advice, the CEO, KEMSA, proceeded to issue commitment letters to the company which, the chairperson and CEO of KEMSA informed the Committee were subsequently cancelled owing to the fact that Kilig Limited were unable to deliver within the specified timelines.

The CEO, KEMSA, also admitted to the Committee during that meeting that the Board of KEMSA did not authorise the expenditure by the board of management for the purchase COVID-19 related items and that the Board of KEMSA was also not aware of the excess expenditure. This was confirmed by the chairperson, KEMSA, during the meeting that the Board did not authorise the expenditure by the board of management beyond the approved KEMSA capital budget. He further stated that the Board of KEMSA only came to know that the budget had been exceeded when the board of management wanted a discussion with the Board of KEMSA to approve a further budget so as to pay the debts incurred in the procurement of PPEs. He further confirmed that the memos by the Director, Procurement, requesting for the stoppage of the procurements were only brought to the attention of the

Board of KEMSA after the procurements had been undertaken and after the investigations into its procurement processes had started.

The Committee noted the observations by the chairperson and the CEO, KEMSA, that the procurements were done at a time when COVID-19 was declared a pandemic and that this required the emergency procurement of medical supplies. The Committee also noted the chairperson's remarks that given the situation the country was in, KEMSA had to order the required commodities and further that they expected a supplementary budget to cover the COVID-19 related expenses.

In the report of the Auditor General to the Committee, the Auditor General noted that the CEO, KEMSA, wrote to the PS, MoH vide a letter ref. KEMSA/CEO/DFS/19/20/6/11/(2) dated 12<sup>th</sup> June, 2020, seeking approval to utilise the monies meant for the UHC programme to meet the expenses incurred in the emergency procurement of COVID-19 related procurements. This request was declined by the PS in her response vide a letter ref. MOH/FIN/1/4 VOL III (77).

The Auditor General further noted that the chairperson, KEMSA, wrote to the CS, MoH, vide a letter ref. KESMA/CEO/ADM/2020/115 dated 20<sup>th</sup> August, 2020 (annex 7), informing the CS, MoH, that KEMSA had utilised the monies meant for the UHC program to meet the expenses incurred in relation to COVID-19. However, the Auditor General noted that the reports from the KEMSA Financial Information Systems indicated that the COVID-19 related procurements were funded from the KEMSA capital budget thereby evidencing the comingling of UHC and KEMSA capital funds which were irregularly used to fund COVID-19 related expenditures.

The Committee further noted the observations by the Auditor General that KEMSA did not maintain separate bank accounts for the different programmes hence making it difficult for the Auditor General to ascertain the unspent balance in the bank with respect to the monies received from the World Bank.

## Committee observations

The Committee observed that section 68(1) of the PFMA imposes an obligation on an accounting officer of, *inter alia*, a National Government entity, to ensure that “*the resources of the respective entity for which he or she is the accounting officer are used in a way that is*

–

- (a) lawful and authorised; and*
- (b) effective, efficient, economical and transparent”.*

Regulation 54 of the Public Finance Management (National Government) Regulations, 2015, further prohibits the use of funds other than the purpose for which those funds were earmarked as follows –

- (1) Except as provided for in the Act and these Regulations, an Accounting Officer of an entity may not authorize payment to be made out of funds earmarked for specific activities for purposes other than those activities.*
- (2) A public officer who makes a payment contrary to paragraph (1) commits an offence under the Act.*

The Committee observed that the existing budget and procurement plan were approved at the beginning of FY 2019/2020 and prior to the declaration of the COVID-19 pandemic in March, 2020. The Committee further observed that at the time of the declaration of COVID-19 in March, 2020, the budget did not make provision for the procurement of items in response to COVID-19. It was further observed that the procurement plans that were in place at the time only provided for the procurement of pharmaceuticals and non-pharmaceutical products that KEMSA procured in its day to day business.

The Committee took note of section 43 of the PFMA which confers on accounting officers, a limited power to reallocate appropriated funds as follows –

- (1) An accounting officer may re-allocate funds from the authorised use but may not reallocate funds where—*

- (a) the funds are appropriated for transfer to another government entity or person;*
- (b) the funds are appropriated for capital expenditure except to defray other capital expenditure;*
- (c) the reallocation of funds is from wages to non-wages expenditure; or*
- (d) the transfer of funds may result in contravention of fiscal responsibility principles.*

The Committee also took note of paragraphs 33 and 34 of the Guidelines for the Preparation of the Annual Budget for State Corporation for Financial Year 2020/2021 and Medium-Term Projections for FYs 2021/2022 and 2022/2023, National Treasury Circular No. 22-2019 which took cognisance of the need by state corporations to revise their budgets where an unforeseen and unavoidable event having an impact on their operations occurs as follows –

- 33. As State Corporations submit their respective annual budget for revenue and expenditure within the set time limits, it is possible that unforeseen and unavoidable events may impact their operations and revision of the budget becomes necessary. Consequently, any revision exceeding 10% of the approved budget for revenue and expenditure must be submitted for review and approval by the line Ministry and the National Treasury and Planning.*
- 34. The revised annual budget for FY 2019/2020 must be submitted separately from proposed annual budget for FY 2020/2021 and projections for FYs 2021/2022 – 2022/2023 and should be done at the earliest time possible when the unforeseen/unavoidable events emerge. The line Ministry and the National Treasury and Planning will not approve any expenditure which has already been incurred.*

The Committee observed that while section 43(1) of the PFMA empowers an accounting officer to re-allocate funds and the parameters within which such re-allocation may be made and the revision of budgets under the National Treasury Circular No. 22-2019, no information was submitted by KEMSA of any steps taken by the CEO, KEMSA, to seek the

necessary approvals for the re-allocation of the KEMSA capital budget for the procurement of COVID-19 related items. The Committee noted that instead, the CEO, KEMSA, issued commitment letters for the procurement of COVID-19 items without a corresponding review or re-allocation of its capital budget, thereby approving the procurement of items that were not covered in its budget.

The Committee observed that given that the CEO, KEMSA, was responsible for the preparation of the budget and procurement plans for approval by the Board, he ought to have been aware that the budget and the existing procurement plans had not made provision for the procurement of COVID-19 related items. Whereas the Committee noted that the COVID-19 pandemic was an emergency, no evidence was submitted by the CEO, KEMSA, of any subsequent steps taken towards re-allocation of funds and reviewing the existing procurement plans and budget to have in place funds for COVID-19 related procurements that would be undertaken subsequently.

In particular, the Committee took note of the submissions by the CEO, KEMSA, made during the meeting held on 28<sup>th</sup> August, 2020, that KEMSA began the process of preparing for COVID-19 on 9<sup>th</sup> February, 2020, when they received a letter from the Ag. Director General informing them to prepare for COVID-19. The Committee noted that the board of management ought to have then began the process of seeking the necessary approvals for re-allocation or budgetary revisions at that point in time given the fact that the KEMSA budget did not make provision for the procurement of COVID-19 related items.

The Committee further observed that the actions by the CEO, KEMSA, to proceed with the procurement of COVID-19 related items were contrary to sections 44 and 53 of the PPADA. In particular, the Committee took note of section 53(8) and (9) of the Act which provides as follows—

*(8) Accounting officer shall not commence any procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.*

*(9) An accounting officer who knowingly commences any procurement process without ascertaining whether the good, work or service is budgeted for, commits an offence under this Act.*

The Committee also found that the CEO, KEMSA, contravened section 68 of the PFMA by failing to ensure that the resources for which he was accounting officer were used in a way that is “*lawful and authorised; and effective, efficient, economical and transparent*”.

✓ The Committee also observed that the use of the KEMSA capital budget and funds meant for the UHC programme for the procurement of medical supplies in response to COVID-19 was not only irregular, but also put the implementation of the UHC programme in jeopardy as items meant to be procured under the UHC programme would either not be procured on time or at all, given that the funds had been diverted for a different purpose.

The Committee noted that section 8 of the KEMSA Act requires the CEO of KEMSA to –

- (c) subject to the direction of the Board, be responsible for the –
  - (i) day to day running and operation of the Authority;
  - (ii) ...
  - (iii) management of funds, property and affairs of the Authority;
  - (iv) implementation of policies and programmes of the Authority and reporting thereon to the Board;

This, according to the Committee, means that the functions and responsibilities of the CEO, KEMSA, and the board of management must be in line with the directions that the Board of KEMSA may issue. However, as observed by the Committee, there was a disconnect between the Board of KEMSA, the CEO, KEMSA and the board of management and lack of transparency and accountability in the performance of the functions by the CEO, KEMSA, and the board of management leading to the irregular procurements.

The Committee observed, from the submissions made during the meeting of the Committee with the KEMSA officials held on 28<sup>th</sup> August, 2020, that the CEO, KEMSA failed to keep the Board of KEMSA informed on the COVID-19 related expenditure incurred. In addition, the CEO, KEMSA only approached the Board of KEMSA after exceeding the KEMSA

capital budget and further, to request for the approval of the additional budget to cover the monies already expended for the procurement of COVID-19 related products. The Committee further observed that despite the CEO's assertions that the KEMSA board of management had involved the Board of KEMSA progressively since March till the end of June, it was clear that the Board was in the dark regarding the actual expenditure incurred in the procurements with respect to the COVID-19 related items.

The Committee also observed that there was lack of a clear understanding or neglect of the fiduciary responsibilities on the part of the CEO, KEMSA, and the board of management as well as lack of an effective system to monitor the compliance, by the CEO, KEMSA, and the board of management, of the legal and financial framework regarding procurements by the entity. The Committee noted that the involvement of the Board of KEMSA by the management was not an effective oversight and compliance tool and a more effective mechanism required to be put in place to ensure compliance.

### **3.4 Market survey and pricing**

The Committee took note of section 54(2) of the PPADA which provides that *"standard goods, services and works with known market prices shall be procured at the prevailing market price"*.

In addition, regulation 22(2) of the Public Procurement and Disposal Regulations, 2006, which were then applicable, provided that –

*(2) When estimating the value of the goods, works or services, the procuring entity shall ensure that the estimate is realistic and based on up-to-date information on economic and market conditions.*

The Committee took note of the obligations imposed on a procurement unit under regulation 8 of the Public Procurement and Disposal Regulations, 2006, which were the Regulations that were applicable during the period under consideration. In particular, regulation 8(3)(z) imposed a requirement on a procuring entity to *"carry out periodic market surveys to inform the placing of orders or adjudication by the relevant award committee"*.

The Committee noted the submissions made to the Committee by the chairperson, KEMSA, that given the fact that the COVID-19 pandemic was something that had not been anticipated and further, that the fact that the pandemic was an emergency, there had been no time to undertake a market survey. In addition, Mr. Edward Njoroge, the Ag. CEO, KEMSA, stated, in a letter ref. KEMSA/CEO/PROC/ADM/2020 dated 9<sup>th</sup> October, 2020 addressed to the Senate, that enquires were made which informed the prices at which items were procured. He further stated that KEMSA by and large buys items on the Kenya Essential Medicines List with a limited range of products being procured from outside the list.

The Director General, PPRA, in submitting the report to the Committee on PPRA's findings on 7<sup>th</sup> October 2020, indicated that no information was submitted by KEMSA to PPRA evidencing the carrying out of a market survey by the board of management of KEMSA, prior to the procurement of COVID-19 related items and further stated that there was no evidence to indicate that the negotiations undertaken by KEMSA were based on a market survey.

The Auditor-General also noted, in the report submitted to the Committee on 30<sup>th</sup> September, 2020, that KEMSA had reviewed the pricing of some commodities that had been delivered to it without any evidence to guide the said review. The Auditor-General highlighted the request by the CEO, KEMSA, to the PS, MoH, made on 18<sup>th</sup> June, 2020, for the payment of items totalling Kshs. 471,576,571 which had been delivered to KEMSA. The PS, MoH, requested for documents to support the payment for the said deliveries upon which the CEO, KEMSA submitted documents supporting payments totalling Kshs. 304,160,118 vide a letter ref. KEMSA/CEO/19/20/6/19(1). The basis for the reduction, according to an email by the Ag. Procurement Manager, Ms. Mary Kitaka, was that they subsequently reviewed the price for the ventilators according to the approved budget which was the cause of the difference. Hence, according to the Auditor General, there was no market survey to objectively guide the pricing or the review of prices for the commodities procured by KEMSA.

The Committee noted, in analysing the tender documentation submitted by KEMSA, that upon the submission of letters of intent by the various suppliers, the CEO, KEMSA, would within a period of between one and seven days, issue commitment letters for the supply of the said items at the prices specified by the supplier. No evidence was tendered of any

negotiations prior to the issuance of the commitment letters and hence, the letters were issued on the basis of the prices as submitted by the suppliers.

In addition, the Committee noted that KEMSA only entered into negotiations with the suppliers after the deliveries had been made and no information was presented by KEMSA to indicate that these negotiations were guided by a market survey. This was confirmed by Mr. Nicholas Gitonga, a Director in Angelica Medical Supplies Limited which supplied to KEMSA with various medical items. In his submission to the Committee during the meeting held on 19<sup>th</sup> November, 2020, he informed the Committee that KEMSA had approached the company to supply it with various COVID-19 related items and upon the issuance of commitment letters, the company proceeded to deliver the said items. He further informed the Committee that negotiations on the pricing were undertaken after the delivery of the medical items and further that the negotiation were undertaken as a matter of formality.

This was also noted in the case of Briema Grains Stores Limited whose Director, Mr. Abdighafar Ali, indicated that the company came up with the initial price at the time of quoting for the items but later entered into negotiations with KEMSA regarding the final price. However, a review of the tender documentation with respect to the company also revealed that these negotiations were undertaken after the items had been supplied to KEMSA. Further, and in the response to the Committees inquiry, the Director of Angelica Medical Supplies Limited stated that it wrote to KEMSA indicating the items that were available in response to the COVID-19 pandemic including a price list based on the information contained in its database. It was noted, from the response and the analysis of the tender documents that the company did enter into negotiations with KEMSA on the pricing but the negotiations were entered into after commitment letters had been issued and the items delivered. Hence, no evidence was submitted indicating that the negotiations were pegged on any market survey.

The Committee further noted that items procured from other suppliers indicated that no market survey was undertaken by KEMSA prior to acceptance of delivery of the items. Mr. James Cheluley, the Director of Shop 'N' Buy Limited, who appeared before the Committee on 2<sup>nd</sup> and 7<sup>th</sup> December, 2020, informed the Committee that the company also wrote letters of intent to KEMSA indicating the prices of the items to be procured. This assertion is also contained in the letter dated 30<sup>th</sup> November, 2020, from the said Director. He further

informed the Committee that the company had supplied items worth over Kshs. 970,000,000.00 but had never had negotiations on their prices. Similarly, Mr. Titus Ibui, the Managing Director of Bell Industries Limited, who appeared before the Committee on 3<sup>rd</sup> and 14<sup>th</sup> December, 2020, informed the Committee that no agreement was reached before the company delivered supplies to KEMSA, stating that the company informed KEMSA of the price at which it was willing to supply various items to KEMSA. Mr. Ibui however informed the Committee that negotiations were undertaken between the company and KEMSA after the delivery of the supplies and the prices reduced. The Committee again noted that the no evidence was submitted indicating that the negotiations were pegged on any market survey.

The Auditor General also noted that at the time of carrying out the audit, stock amounting to Kshs. 7,632,068,588 had been received while stock valued at Kshs. 6,279,531,019 was still lying at the KEMSA warehouses as at 18<sup>th</sup> September, 2020. The Auditor General further informed the Committee of the communication by KEMSA to the CS, MoH, dated 20<sup>th</sup> August, 2020, indicating that if KEMSA was to liquidate the stock through sale, the selling price would have to be marked down to match the current market price. This, the Committee noted, would result in a loss of Kshs. 2,338,261,175 if KEMSA sold the existing stock at the prevailing market price as per the market survey that was subsequently conducted by KEMSA after the investigations began.

The Committee noted, during the site visit to the KEMSA warehouse on 1<sup>st</sup> December, 2020, that there were still in place large volumes of stock procured by KEMSA in response to the pandemic. According to the Auditor General, KEMSA had procured stock between the months of March and July, 2020, at Kshs. 7,632,068,588.

The Committee further noted that KEMSA had been unable to sell the said stock, one of the reasons being that the price at which the items were available in the market was much lower than the price at which KEMSA intended to resell the stock. During the Committee visit at the KEMSA Embakasi warehouse on 1<sup>st</sup> December, 2020, the KEMSA Ag. CEO, Mr. Edward Njoroge, informed the Committee that KEMSA could not recoup its costs if it sold the supplies in their warehouses at the prevailing market rates. He stated that if KEMSA sold its supplies at market rates it would lose more than Kshs. 2 billion and that the gap in the loss would continue with each passing day as market prices continued to decline.

### **Committee observations**

The Committee was cognisant of the importance of market surveys by procurement entities in order to realise value for money and maximise the benefits that would accrue in carrying out the procurement processes by KEMSA. In particular, the Committee observed that in order to realise the benefits that would accrue to a procuring entity, the entity would need to, in carrying out a market survey, properly identify the goods and services that are available to satisfy the requirements of the procurement entity, determine if the minimum requirements are practical or realistic, identify proper sources and availability of goods and determine whether the cost estimates and price at which goods are to be procured is realistic.

The Committee observed that given the fact that the CEO, KEMSA, received communication from the Ag. Director General informing them to prepare for COVID-19 on 9<sup>th</sup> February, 2020, and further, given that COVID-19 was declared a pandemic in March, 2020, KEMSA ought to have taken the necessary steps towards planning for the pandemic including determining the commodities to be procured, the source and pricing in a manner that would ensure value for money. The Committee further observed that whereas the initial procurements undertaken in March, 2020, were undertaken on an emergency basis, the fact that the COVID-19 pandemic continued for months after meant that KEMSA still had the time and opportunity to undertake a rapid market survey to guide it in the conduct of subsequent COVID-19 related procurements.

The analysis, by the Committee, of the tender documents submitted by KEMSA revealed that the bidders, in most instances, indicated to KEMSA the quantity of, and prices at which, the goods were available upon which KEMSA would immediately thereafter issue a commitment letter to the said suppliers. There was no evidence submitted to indicate that the negotiations that were subsequently undertaken by KEMSA at the negotiation stage with the bidders were based on the prevailing market rates or market surveys conducted by KEMSA. In addition, the Committee noted that the unit price at which the companies sought to supply KEMSA with medical supplies varied, amongst the supplier companies, with respect to the same item as follows –

#### **Table 13: Price comparison amongst various suppliers**

No.	Item	Prices by various suppliers	Month of Commitment letter and delivery
1.	Surgical face masks 3 ply ear-loop	Kshs. 2,080.00	March, 2020
		Kshs. 1,800.00	April, 2020
		Kshs. 3,600.00	April, 2020
		Kshs. 3,750.00	April, 2020
		Kshs. 4,500.00	April, 2020
2.	PPEs	Kshs. 7,500.00	April, 2020
		Kshs. 9,000.00	Between April and May, 2020
3.	Surgical gloves	Kshs. 1,590.00	March, 2020
		Kshs. 2,100.00	March, 2020
4.	Hand sanitiser	Kshs. 490.00	April, 2020
		Kshs. 500.00	Between April and May, 2020

The Committee observed that given that KEMSA did not conduct a market survey, it should have, at the least, used the lowest price submitted by the companies as a guide and the basis for determining the price at which to procure the respective items or the basis for negotiating with the suppliers of the respective items prior to issuing commitment letters.

The Committee noted that whereas KEMSA did, in most instances, enter into negotiations with the companies that supplied it with COVID-19 related items, these negotiations were entered into after the companies had indicated the price at which the goods would be supplied in the letters of intent and after commitment letters had been issued and the goods had been supplied. In addition, there was no indication from the negotiation minutes that the negotiation committees were guided by any market survey or the minimum price. Hence, the Committee observed that the process was bidder driven rather than KEMSA driven.

The Committee further observed that in some instances, the bidders submitted bids that were higher than the price set out in the letters of intent to supply KEMSA with various items. The negotiations in this instance would result in the lowering of the bid price to match the price set out in the letters of intent hence rendering the process a mere formality. In addition, even

where the bidders failed to lower the prices, they were still in all instances, awarded the contract. The Committee further observed that this put KEMSA in a precarious position financially as there would have been little leeway for KEMSA to negotiate, given that the suppliers had already delivered, and KEMSA had already accepted, the items forming the basis of the negotiations. This, the Committee observed, also appeared to be an attempt by KEMSA to sanitise a process that was already flawed. Hence, according to the Committee, the negotiations were of no value and were, as noted by the Director of Angelica Medical Supplies Limited, a matter of formality.

The review of the pricing of the ventilators as communicated by Ms. Mary Kitaka to PS, MoH via email and as was noted by the Auditor General in her report to the Committee was also a clear indication that KEMSA was not well versed with the prevailing market conditions and pricing and hence, the procurement pricing and supply was supplier driven rather than KEMSA driven.

The Committee observed that despite the Ag. CEO, KEMSA, indicating, in the letter to the Senate, that KEMSA relied on the Kenya Essential Medicines List to procure its supplies, no evidence was submitted by KEMSA regarding its reliance on the Kenya Essential Medicines List which served as a pricing guide on the medical supplies existing in the market. In addition, nothing in the tender documentation, and in particular, the negotiation minutes with respect to the various tenders, suggests that reference was made to the List. Hence, the assertion by the Ag. CEO, KEMSA that they relied on the Kenya Essential Medicines List in the procurement was found not to have been substantiated.

The Committee therefore found that failure by KEMSA to carry a market survey exposed KEMSA to high prices as decisions made by KEMSA for the procurement of medical supplies in response to COVID-19 were not made on an objective basis and the prevailing market environment but rather, by the suppliers who indicated the price at which they were willing to supply the items after which KEMSA issued commitment letters. In addition, the Committee observed that any negotiations undertaken with the companies were merely cosmetic, intended to sanitise a process that had been flawed from the start.

The Committee also noted that whereas regulation 8(3) of the Public Procurement and Disposal Regulations, 2006, imposed a requirement for the conduct of a market survey by a

procuring entity, it did not provide a framework for the manner in which this would be carried out in cases where procurements are to be undertaken on an emergency basis or the alternatives a procuring entity had where it was not able to undertake a survey prior to procurement. Hence, the Committee observed that it would be necessary to review the existing legal framework to make provision for the manner in which rapid market surveys could be conducted or alternatives available to a procuring entity in the case of an emergency procurement.

### **3.5 Use of prequalified or registered suppliers**

The Committee took note of section 57 of the PPADA which provides as follows –

*(1) The head of the procurement function of a procuring entity shall maintain and update lists of registered suppliers, contractors and consultants in the categories of goods, works or services according to its procurement needs.*

*(2) Submission of names shall be continuous and the registration list shall be updated periodically as prescribed in Regulations and in accordance with this Act*

The Committee also took note of section 52 of the PPADA which provides as follows –

*(1) The 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.*

*(2) 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 this Act.*

*(3) A procuring entity may use the register list of another State organ or public entity whenever the procuring entity's list does not suffice.*

*(4) The procuring entity shall obtain the whole list of relevant category from the State organ or entity, and together with its own relevant list, subject the list to this Act.*

Section 56 of the PPADA also enables a procuring entity to use the list of qualified persons prepared by another State organ, public entity or regulated professional body as follows –

*(1) To identify qualified persons, a State organ or public entity may seek, in writing, to use another State organ's, public entity's or regulated professional body's registration list of all registered persons in the category,*

*provided that the list is valid and developed through a competitive process in accordance with the relevant provisions of this Act or, in the case of regulated professional bodies, developed through a process in accordance with relevant provisions of the legislation regulating the particular profession.*

*(2) The State organ or public entity shall then subject the list, together with its own, where applicable, to the procedures in this Act.*

The Director, Procurement, of KEMSA, informed the Committee during the meeting held on 28<sup>th</sup> August, 2020, that KEMSA did have in place a list of registered suppliers. He informed the Committee that most of the items that were required to be procured for purposes of COVID-19 were not stocked by KEMSA and hence, KEMSA did not have in place a list of suppliers for most of the items required for COVID-19 purposes. He further informed the Committee that KEMSA used a combination of suppliers on the registered list and those who were not in the registered list for items that were not in the KEMSA's normal inventory items.

The CEO, KEMSA, also informed the Committee that they were guided by the advisory issued by the Solicitor General regarding the direct procurement of the COVID-19 related items in line with section 69 and 103 of the PPADA and further, that the said advisory did not make reference to section 56 of the PPADA on the use of a list prepared by another public entity.

### Committee observations

The Committee observed that despite section 56 of the PPADA authorizing a procuring entity to use the pre-qualification list of another public entity, the board of management, KEMSA, did not do that but instead, procured from unlisted companies.

The Committee further observed that no evidence was submitted by KEMSA of any due diligence carried out with respect to the companies that were not on the prequalification list to determine--

- (a) whether or not their memorandum and articles of association authorised the engagement of the said companies in the business of pharmaceutical and non-pharmaceutical supplies;
- (b) the financial capability of the companies to deliver;
- (c) the experience the companies had in undertaking similar works or supplies; and
- (d) any compliance issues that the companies may have had prior to the award of tender.

This, the Committee noted, was evidenced in the case of the Kilig Limited which the CEO, KEMSA, stated was issued with a commitment letter to supply KEMSA with PPEs. The said company was not amongst the companies in the list of prequalified suppliers and neither did KEMSA carry out any due diligence to determine the company's capacity to supply the items. The CEO, KEMSA, informed the Committee that it was only after the company failed to deliver within the stipulated timeline and kept seeking extensions that KEMSA proceeded to carry out its due diligence. It is only then that KEMSA realised that the company was not capable of delivering, that KEMSA would not get value for money and that no budget existed to cover the cost and proceeded to cancel the commitment letter.

The Committee observed that even if the list of registered suppliers did not contain suppliers who stocked COVID-19 related items, KEMSA had the leeway to use the pre-qualified lists of other State organs or public entities in line with section 52 of the PPADA. In addition, KEMSA ought to have undertaken some form of due diligence of the companies awarded tenders to ensure their ability to deliver on the items procured.

The Committee took note of section 44(1) of the PPADA which imposes an obligation on an accounting officer of a public entity to ensure that the public entity complies with the provisions of the PPADA. The Committee therefore found the CEO, KEMSA, to be in breach of sections 52(3) and (4) and 57 of the PPADA and to have abdicated his responsibility under section 44 of the PPADA as failure to ensure adherence to the provisions of the PPADA exposed KEMSA to financial risk and also posed a risk in terms of the quality of products that were delivered.

### 3.6 Procurement process

The Committee took note of Article 227 of the Constitution which provides that –

*(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.*

The Committee noted that the PPADA outlines the manner in which a public entity should carry out procurement processes and the responsibilities of the various actors in the process. In particular, the Committee took note of section 45(3) of the PPADA which provides as follows–

*(3) All procurement processes shall be -*

- (a) within the approved budget of the procuring entity and shall be planned by the procuring entity concerned through an annual procurement plan;*
- (b) undertaken by a procuring entity as per the threshold matrix prescribed; and*
- (c) undertaken in strict adherence to Article 227 of the Constitution.*

The Committee considered the submissions made by the Board and management of KEMSA as well as other stakeholders and analyzed the documents relating to the procurements undertaken by KEMSA and noted the following issues -

### 3.6.1 Procurement planning

The preparation of procurement plans is governed by the PPADA. Section 53 of the PPADA sets out the parameters for the preparation of a procurement plan by an accounting officer of a procuring entity as follows –

*(1) All procurement by State organs and public entities are subject to the rules and principles of this Act.*

*(2) An accounting officer shall prepare an annual procurement plan which is 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.*

*(3) Any public officer who knowingly recommends to the accounting officer excessive procurement of items beyond a reasonable consumption of the procuring entity commits an offence under this Act.*

*(4) All asset disposals shall be planned by the accounting officer concerned through annual asset disposal plan in a format set out in the Regulations.*

*(5) A procurement and asset disposal planning shall be based on indicative or approved budgets which shall be integrated with applicable budget processes and in the case of a State Department or County Department, such plans shall be approved by the Cabinet Secretary or the county executive committee member responsible for that entity.*

*(6) All procurement and asset disposal planning shall reserve a minimum of thirty per cent of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups.*

*(7) Multi-year procurement plans may be prepared in a format set out in the Regulations and shall be consistent with the medium term budgetary expenditure framework for projects or contracts that go beyond one year.*

*(8) Accounting officer shall not commence any procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.*

*(9) An accounting officer who knowingly commences any procurement process without ascertaining whether the good, work or service is budgeted for, commits an offence under this Act.*

*(10) For greater certainty, the procurement and disposal plans approved under subsection (5) shall include choice of procurement and disposal methods and certain percentages referred to under subsection (6).*

*(11) Any state or public officer who fails to prepare procurement and disposal plans shall be subject to internal disciplinary action.*

In addition, regulation 20(2) of the Public Procurement and Disposal Regulations, 2006, which were then applicable, required the procurement plan to be integrated with the budget as follows–

*(2) Annual procurement planning shall be integrated with applicable budget processes and based on indicative or approved budgets, as appropriate.*

The Committee observed the fact that procurement plans are required to be based on an approved budget and are meant to guide a procuring entity in the procurement of goods and services which are necessary for the carrying out of the functions of that entity. The Committee however noted that at the time of the declaration of the COVID-19 pandemic in March, 2020, the KEMSA procurement plans that were in place at the time had only made provision for the procurement of pharmaceuticals and non-pharmaceuticals which were usually procured by KEMSA in their day to day business as the pandemic had not been anticipated by KEMSA.

The Committee noted that subsequent procurement plans were prepared and approved in April and May, 2020, by the CEO, KEMSA, for the procurement of medical supplies in response to COVID-19, by which time, procurements worth over Kshs. 5 billion had been undertaken as per table 6. An analysis of the documents received from KEMSA and the reports submitted to the Committee by PPRA and the Auditor General revealed that the CEO, KEMSA, approved procurement plans for the direct procurement of medical supplies in response to COVID-19 through KEMSA's capital funds as follows –

**Table 14: Procurement plans for FY 2019/2020 (KEMSA Capital funds)**

No.	Project	Amount	Date approved
1.	Supply of red top plain tubes 4ml and vortex mixer	477,600	29 <sup>th</sup> April, 2020
2.	Supply of COVID-19 HPTs	5,095,550,000	27 <sup>th</sup> May, 2020
	<b>Total</b>	<b>5,096,027,600</b>	

The Committee however noted that no budget existed for the procurement of COVID-19 related items at the time that would have formed the basis for the approval of the procurement plans to be funded using the KEMSA capital nor the procurement of the items contained in the said plans.

The Committee also noted, from its analysis of the tender documents submitted by KEMSA and the submissions made by the Director General, PPR, to the Committee, that the procurement plans approved by KESMA for the procurement of medical supplies through monies allocated by MoH were as follows –

**Table 15: Procurement plans for FY 2019/2020 (MoH funds, World Bank funds and KNH drawing rights)**

No.	Source of funds	Amount (Kshs.)	Date approved
1.	Ministry of Health	248,912,000.00	20 <sup>th</sup> March, 2020
2.	Ministry of Health	12,913,080.00	25 <sup>th</sup> March, 2020
3.	Ministry of Health	90,000,000.00	30 <sup>th</sup> March, 2020
4.	Ministry of Health	621,593,540.95	3 <sup>rd</sup> April, 2020
5.	Ministry of Health	16,240,100.00	7 <sup>th</sup> April, 2020
6.	World Bank (through Ministry of Health)	758,438,083.25	29 <sup>th</sup> April, 2020
7.	Ministry of Health	8,700,000.00	5 <sup>th</sup> May, 2020
8.	Ministry of Health	2,800,000.00	5 <sup>th</sup> May, 2020
9.	Ministry of Health	365,940,000.00	13 <sup>th</sup> May, 2020
10.	Ministry of Health	86,704,000.00	13 <sup>th</sup> May, 2020
11.	KNH drawing rights	189,616,264.00	18 <sup>th</sup> May, 2020
12.	KNH drawing rights	370,519,850.00	22 <sup>nd</sup> May, 2020
	<b>Total</b>	<b>2,772,376,918.25</b>	

In his submissions during the meeting held on 28<sup>th</sup> August, 2020, the CEO, KEMSA, informed the Committee that KEMSA would undertake procurements using several approvals including that of the National Treasury and MoH as the recipient of funds from the Global Fund and USAID. With respect to the procurements made at the request of MoH (item 6 in table 7), the Committee took note of a letter ref. MOH/ADM/1/1/171 Vol.1(196) dated 15<sup>th</sup> April, 2020 by the PS, MoH, addressed to the CEO, KEMSA, requesting for the procurement, by KEMSA, of various items worth Kshs. 758,690,583.25 that had been identified and approved by the World Bank under the THS project to support the Government in its COVID-19 response activities. The request contained the items to be procured, the price at which they were to be procured and the entities from which KEMSA was to undertake the procurements from. The CEO, KEMSA, informed the Committee that KEMSA used this request from the PS, MoH as an approval for the procurement of the items specified therein following a meeting held with MoH on 9<sup>th</sup> March, 2020. The procurement of the items was to be financed through monies from the World Bank.

The chairperson, KEMSA, informed the Committee that the budget with respect to FY 2019/2020 and the procurement plans in relation to that financial year had been approved by the Board of KEMSA in the previous financial year and did not include any provision for the procurement of COVID-19 related items. This was also noted by the Auditor General who, in the report to the Committee, noted that there was no approved budgeted allocation for COVID-19 related procurements with respect to KEMSA capital budget and the UHC budget at the time of procuring the items under the procurement plans.

The chairperson, KEMSA further informed the Committee that they were undertaking procurement processes for their normal business when COVID-19 was declared a pandemic in Kenya. He further informed the Committee that this changed the scene as they now had to carry out emergency procurements and further, that KEMSA did not know how long COVID-19 would take. It was on this basis that they procured the quantities that they did at that time. The Committee noted that no corresponding re-allocation of monies appropriated for use by KEMSA had been made in line with section 43 of the PFMA.

### **Committee observations**

The Committee observed that procurement planning is a critical component of the procurement process as it enables a procuring entity to clarify and quantify the costs to be incurred in acquiring the goods and services by an entity and schedule the objectives of the procurement; to define the plan for accomplishing the objectives and further enables a procuring entity develop the most appropriate methodology for evaluating the performance against the defined objectives of the procurement.

The Committee took note of section 53 of the PPADA which requires an accounting officer to prepare a procurement plan within the limits of an approved budget. The procurement plan serves as a guide to the procurement entity in terms of the quantities of, and cost at which, items are to be procured by the entity within the limits of the budget. In particular, section 53(8) requires an accounting officer to ensure that there are sufficient funds to meet the obligations that may arise out of a contract reflected in the approved budget estimates.

The Committee observed that KEMSA's capital budget and the UHC budget for FY 2020/2021 had not made provision for the procurement of medical supplies for purposes of COVID-19. In addition, the procurement plans existing before the COVID-19 pandemic did not make any provision for the procurement of COVID-19 related items as these had been approved prior to the declaration of COVID-19 pandemic in Kenya. The Committee therefore found that there was no basis for the subsequent approval of procurement of COVID-19 related items by the CEO, KEMSA as there was no budgetary allocation for the procurement of the said items.

The Committee also noted that while regulation 53(5) of the Public Finance Management (National Government) Regulations, 2015, envisages a situation where an accounting officer of a procuring entity may make changes to its approved procurement plan in consultation with the CS, this ought to be supported by a corresponding review of the budget. From the information submitted by KEMSA, the Committee noted that no re-allocations had been made prior to the approval of the procurement plans or execution of the tender awards nor any review of the KEMSA budget in line with National Treasury circular 22 of 2019.

The failure by KEMSA to review the procurement plans and tie them to an approved budget meant that KEMSA had no basis against which to determine the items to procure or the cost or to monitor and assess the effectiveness and economic efficiency with which it undertook the procurement processes.

### 3.6.2 Initiations of the procurement process

Section 53 (8) of the PPADA requires accounting officers of procurement entities to ensure that there are in place sufficient funds prior to the commencement of procurement processes as follows –

*(8) Accounting officer shall not commence any procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.*

In addition, section 73 of the PPADA provides for the initiation of the procurement process in the manner prescribed in Regulations. Regulation 22 of the then applicable Public Procurement and Disposal Regulations, 2006, provided as follows regarding this process –

*(1) Every procurement requirement shall be initiated using a purchase requisition which shall include all necessary information pertaining to the procurement.*

*(2) When estimating the value of the goods, works or services, the procuring entity shall ensure that the estimate is realistic and based on up-to-date information on economic and market conditions.*

*(3) The purchase requisition shall be approved by the person specified in the First Schedule, prior to the initiation of procurement proceedings.*

*(4) Approved procurement requisitions shall be submitted to the procurement unit of the procuring entity to initiate procurement proceedings.*

*(5) Upon receipt of the approved purchase requisition, the procurement unit shall prepare a procurement plan for each individual procurement requirement,*

*which shall include an estimate of the time required for each stage in the procurement cycle.*

The Committee noted that the procurement processes had been initiated either at the request of MoH or through various suppliers. The Committee noted that in the case of MoH, the PS, MoH, submitted various requests in writing to KEMSA and requested for the urgent procurement of COVID-19 related items. According to the information contained in the request, the items to be procured were based on resolutions arrived at during meetings held with the Laboratory and Resource Mobilization Team of the National Taskforce for Corona Virus Preparedness and Response as well as visits conducted by MoH officials to various institutions including their penal institutions. The team and taskforce had identified various items required to be procured to meet the COVID-19 related needs. In addition, further requests for the procurement of COVID-19 related items were also made to KEMSA by the PS, MoH following receipt of financial support from the World Bank. The PS, MoH in these instances would write to the CEO, KEMSA specifically indicating the items to be procured as well as the required quantities. These correspondences, as was noted by the CEO, KEMSA during the meeting with the Committee on 28<sup>th</sup> August, 2020, would, following their approval, be deemed as procurement plans that formed the basis for the said procurements.

In its analysis of the tender documents submitted by KEMSA, the Committee found that while some of the procurement processes had been commenced through requests by the Director, Commercial Services, in KEMSA, others had been commenced following the submission, by suppliers to KEMSA, of letters of intent to supply various medical items in response to COVID-19. The Committee noted that the CEO, KEMSA, would then write back to the suppliers informing them that they had been identified by GoK as strategic partners in the fight against COVID-19 and further require them to supply specified quantities of goods either immediately or within a timeline ranging from five to fourteen days after which the tender process of the said items would commence. Some commitment letters further provided that where the suppliers failed to deliver the goods within the timelines specified, the commitment letter would stand cancelled.

The CEO, KEMSA informed the Committee, during the meeting held on 28<sup>th</sup> August, 2020, that they invented retrospective procurements with the guidance of the Director of Procurement upon which they began the process by issuing commitment letters. He further

indicated that these letters were issued to the entities that had the commodities and whom they had identified. He informed the Committee that they relied on section 69 of the PPADA which provided for procurement on an urgent need. He however stated that there were no regulations in place to guide the process. The Director, Procurement, also informed the Committee during the same meeting that the suppliers of KEMSA did not play a role in determining the items that were to be supplied to KEMSA. He further stated that KEMSA requested the suppliers to give an intent of the quantity of items that they could deliver to KEMSA.

In a letter ref. KEMSA/CEO/PROC/ADM/2020 dated 9<sup>th</sup> October, 2020 addressed to the Senate, the Ag. CEO, KEMSA, also stated that no procurement was initiated by suppliers but rather that the procurement process started by potential suppliers being requested to provide product samples which were evaluated against set specifications. He further stated that if the samples met the specifications, the suppliers would then be asked to submit a letter of intent and KEMSA would then issue a commitment letter before delivery of goods.

During the meetings held on 2<sup>nd</sup> and 7<sup>th</sup> December, 2020, the Committee was informed by Mr. James Cheluley, Director, Shop 'N' Buy Limited that the company learnt through companies it previously supplies medical items to, that KEMSA required various medical items whereupon they went to the offices of KEMSA and requested to supply KEMSA with various items. He further informed the Committee that he was requested to submit to KEMSA a letter of intent. He confirmed that the company thereafter initiated the procurement process by sending letters of intent to KEMSA. In addition, Mr. Titus Ibui, Director, Bell Industries Limited, informed the Committee during the meeting held on 14<sup>th</sup> December, 2020, that they had learnt through the media that Kenya lacked adequate PPEs and, being a prequalified supplier of KEMSA, he visited the KEMSA offices to inquire on how they can supply PPEs to KEMSA. He was given instructions and followed them by submitting their letter of intent to KEMSA for the supply of various items in response to COVID-19 to KEMSA upon which they received commitment letters to supply the said items.

Mr. Abdighafar Ali, Director of Briema Grain Stores Limited, stated in his letter dated 14<sup>th</sup> December, 2020, to the Senate that they learnt through the media that MoH wanted to procure PPEs in order to mitigate the spread of COVID-19. He confirmed that they

subsequently initiated the procurement by writing a letter of intent to KEMSA requesting to supply PPEs. He further stated, in the letter, that it had been a practice of the company to initiate procurement processes in order to look for business opportunities and sell their products. The Committee found the situation to be similar in the case of Angelica Medical Supplies Limited who, in their submissions to the Committee on 2<sup>nd</sup> December, 2020, indicated that they sent out generic letters to various health care providers including KEMSA and further, that it was not aware of the specific items that KEMSA required.

The DG, PPRA, in the report presented to the Committee on 23<sup>rd</sup> September, 2020, made similar observations as those of the Committee regarding the initiation of the procurement process by the suppliers. In addition, the DG, PPRA, noted that whereas they had found user requisitions by the Director, Commercial services initiating the procurement process, some of these had been retrospectively prepared after the commitment letters had been issued by the CEO, KEMSA. The DG also noted that KEMSA did not demonstrate how the bidders came to obtain information regarding the opportunity to supply the items contained in their letters of intent.

The Committee also noted the observations made by the Auditor General, in the report to the Committee, regarding the internal memo issued by the Director of Procurement to all Heads of Department on 24<sup>th</sup> April, 2020, setting out the procedure to be used in procuring COVID-19 related items. In particular, the memo required all prospective suppliers to submit letters of intent together with a sample of the items to be supplied for purposes of evaluation. The memo also required that the procurements be undertaken within the approved budget. This, according to the Auditor General was contrary to section 73 of the PPADA and regulation 22(1) of the Public Procurement and Disposal Regulations, 2006, which required procurements to be initiated by the respective user departments through requisitions rather than being supplier driven. The Auditor General also noted that by the time the guidelines had been issued by the Director of Procurement, commitment letters totalling Kshs. 3,99,636,560 had already been issued to various suppliers by the CEO, KEMSA.

The Ag. CEO, KEMSA in the letter dated 9<sup>th</sup> October, 2020, addressed to the Senate stated that KEMSA did not advertise tenders due to the “challenges posed by the outbreak of Covid-19”. The Committee found this response to be wanting particularly regarding how COVID-19 interfered with KEMSA’s ability to advertise the tenders given that these could be done

electronically through its website, media or through the local newspapers which were still in circulation.

#### **Committee observations**

The Committee observed, from the submissions made by the directors of the companies that appeared before the Committee and an analysis of the communication between KEMSA and the various suppliers, that the suppliers approached KEMSA indicating the COVID-19 related items they had in stock and their willingness to supply KEMSA with the said items. The Committee further observed that it was on this basis that the suppliers submitted the letters of intent to supply KEMSA with the said items. In addition, the Committee observed, from its review of the tender documentation submitted to it by KEMSA, that while some procurement processes had been initiated internally by the Director, Commercial Services, most appeared to have been initiated by the suppliers issuing a letter of intent to supply the items upon which KEMSA would issue a commitment letter.

Whereas the CEO, KEMSA did indicate to the Committee that they began the procurement process by identifying suppliers, it was noted that no information was submitted by KEMSA evidencing the process of identifying the suppliers or any notices that may have been issued to suppliers requesting them to supply KEMSA with various items in response to COVID-19. In addition, the information submitted by the CEO, KEMSA contradicted that which was submitted by the companies that appeared before the Committee to the extent that the suppliers would initiate contact with KEMSA requesting to supply various medical items. Hence, the Committee observed that in these instances, the process was supplier driven and was commenced at the initiation of the suppliers and not KEMSA.

The Committee thus found that the initiation of the procurement process was carried out contrary to section 73 of the PPADA and regulation 22 of the Public Procurement and Disposal Regulations, 2006 as these appeared to have been supplier driven and initiated at the instance of suppliers.

### 3.6.3 Needs assessment

The Committee noted that no needs assessment was undertaken immediately after the declaration of COVID-19 as a pandemic or subsequently thereafter. The Committee also noted the observations by the chairperson and CEO, KEMSA, that the pandemic was abrupt and required urgent intervention by KEMSA.

The Committee also noted the Auditor General's observations that there was no evidence to establish that the procurement process was triggered by a needs assessment. It was noted that unlike the case of MoH which had information regarding the requirements from meetings with the Laboratory and Resource Mobilization Team of the National Taskforce for Corona Virus Preparedness and Response and its own surveys, KEMSA had no basis for undertaking the procurements in the quantities that it did.

During the visit to the KEMSA warehouse in Embakasi, the Committee noted that there were large quantities of items procured in response to COVID-19 still lying in the warehouse. The Committee found that stock worth Kshs. 5.9 billion was still lying in the warehouse at the time of the site visit. From this stock, the Committee was informed by the Ag. CEO, KEMSA that the items worth Kshs. 2.9 billion had not been paid for by KEMSA and could therefore not be sold. The Ag. CEO further informed the Committee the remaining items worth close to Kshs. 3 billion were ready to be sold but had not been sold since their procurement cost was higher than the prevailing market prices. According to the Auditor General, some of the items had been lying in the warehouses for as long as six months as at September, 2020, as follows

Table 16: Age analysis of stock by Auditor General as at 18<sup>th</sup> September, 2020

No.	Value of stock at hand (Kshs.)	Quantity held (%)	Duration in warehouse
1.	192,920,363	3	6 months
2.	1,601,488,855	26	5 months
3.	3,257,909,010	52	4 months
4.	1,035,454,200	16	3 months
5.	128,758,590	2	2 months
6.	63,000,000	1	0 months
	<b>6,279,531,018</b>	<b>100</b>	

The Committee noted the observations of the Auditor General that given the duration that the stock had been in the warehouses, it was clear that “KEMSA over procured COVID-19 related stock without an objective assessment and forecasting of the existing demand for the products”. This, the Committee observed meant that KEMSA found itself in a financially precarious position given that its monies were tied up in stock thereby limiting KEMSA’s capacity to carry on with its day to day business. The Committee also found that KEMSA had no basis for procuring the items in the quantities that it did.

#### **Committee observations**

The Committee observed that the failure by KEMSA to undertake a needs assessment meant that the commitment letters issued and items were procured in quantities that did not tally with the prevailing needs. The Committee further observed that this has put KEMSA in a financially precarious position and exposed it to financial loss.

The Committee further observed that given the duration which the stock has been held by KEMSA, it was clear to the Committee that the reason given for the emergency procurement of the COVID-19 related items was not a sufficient justification for the procurement by KEMSA, of the items in the quantities that it did.

The Committee also noted with concern the Auditor General’s observations that the procurement processes could have been influenced by the suppliers and management of KEMSA hence, requiring further investigation into the companies that were engaged by KEMSA. This, the Committee observed was supported by the fact that as noted in 3.5.2, some procurement processes were initiated by the suppliers making a request to supply KEMSA with various items and hence, were supplier driven.

#### **3.6.4 Issuance of commitment letters**

The Committee took note of regulation 51 of the PFM (National Government) Regulations, 2015 which provides a framework for the issuance of commitments for the supply of goods and services as follows –

- (1) All commitments for supply of goods or services shall be done not later than May 31<sup>st</sup> each year except with the express approval of the accounting officer in writing.*
- (2) Expenditure commitments for goods and services shall be controlled against spending and procurement plans approved by the responsible Accounting Officer, based on allocations and allotments from approved budgets.*
- (3) The Accounting Officer of that government entity shall make an expenditure commitment only against the procurement plan approved for that entity in accordance with the Public Procurement and Disposal Act, 2005 and the Regulations made thereunder.*
- (4) At minimum, a procurement plan shall include proper descriptions of the procuring items, unit cost, the estimated contract value, and the procurement method relating to the annual portion of a multi-year contract and delivery schedule.*
- (5) Any changes to approved procurement plan during the year shall be approved by the responsible Accounting Officer in consultation with the Cabinet Secretary of the entity.*
- (6) Any public officer who contravenes the provisions of this regulation commits an offence.*

During the meeting held on 28<sup>th</sup> August, 2020, with the management of KEMSA, the CEO, KEMSA, informed the Committee that since they adopted the retrospective procurement of goods for purposes of COVID-19, KEMSA had issued commitment letters to suppliers who confirmed that they had the goods. The CEO, KEMSA, further informed the Committee that once the goods were delivered, the quality department would carry out a check to determine if the goods were of good quality upon which they would return substandard supplies to the suppliers. It is only after this process that they would issue tender documents.

The Committee noted that despite the warnings issued by the Director of Procurement to the CEO, KEMSA, in April, May and June 2020 that the issuance of commitment letters be halted as these had exceeded the KEMSA budget, the CEO, KEMSA, disregarded the advice and proceeded with the issuance of commitment letters and the subsequent procurement processes for COVID-19 related items. When put to task by the Committee, the CEO,

KEMSA, acknowledged receiving the memos from the Director of Procurement and further stated that the memo was discussed at a directors meeting and an agreement reached that there would be a mobilization of funds to meet the gap.

According to the report by the Auditor General to the Committee, the commitment letters issued by KEMSA for the procurement of medical supplies in response to COVID-19 amounted to Kshs. 7,780,281,788 despite not having a budget allocation for COVID-19 related procurements as follows –

**Table 17: Commitment letters issued by KEMSA**

No.	Particulars	Amount (Kshs.)
1.	Commitment letters issued	7,780,281,788
2.	Value of goods received	7,632,068,588
3.	Amount paid to suppliers	4,712,869,916
4.	Amount outstanding to suppliers	2,919,198,672

The Auditor General further noted that the supplies valued at Kshs. 7,632,068,588 were procured and supplied to KEMSA using the UHC and KEMSA capital budget as there was no budget available for the procurement of supplies in response to COVID-19 at the time.

The Committee took note of the concerns raised by PPRA in its report to the Committee regarding the information contained by the commitment letters. In particular, PPRA noted that the commitment letters did not contain the specific requirements of the items to be procured contrary to section 60(1) and 104 of the PPADA.

The Committee, in analysing the commitment letters noted that whereas the letters set out the quantity and dates within which the goods were to be delivered, the letters did not include information on the quality standards or other specifications of the goods nor the price at which the goods were to be supplied at. The Committee also found that at the time of entering into the contracts with suppliers, the goods had already been delivered to the KEMSA warehouse.

The Committee noted that one commitment letter was cancelled ostensibly after KEMSA established that the supplier did not have capacity to deliver the goods. During the Committee meeting held on 28<sup>th</sup> August, 2020, the CEO, KEMSA, informed the Committee that they had issued commitment letters to Kilig Limited when the company demonstrated that it had the capacity to bring to Kenya a planeload of commodities but cancelled the letters after KEMSA established, after carrying out due diligence, that the company had no capacity to fulfil the supply. It is therefore evident that no due diligence was carried out by KEMSA before issuing commitment letters as was confirmed in the case of Kilig Limited.

#### **Committee observations**

The Committee observed that at the time KEMSA issued commitment letters to suppliers, there was no budget in place to support the said issuance. The Committee noted that despite being advised by the Director of Procurement not to continue with the issuance of commitment letters owing to the fact that the KEMSA capital budget had been exceeded, the CEO, KEMSA, disregarded this advice and continued to issue the said letters. The Committee also noted that no evidence was submitted by the CEO that the resolution arrived at was communicated to the Board of KEMSA or that the Board was informed of the expenditure beyond KEMSA's budget. This the Committee noted with concern was not only irregular but also placed KEMSA in a financially precarious position.

The Committee also observed that suppliers only submitted their samples in response to the tender for the direct procurement, from the supplier, of the items and after they had already delivered the goods. In most instances, the procurement processes commenced after the goods had been delivered to KEMSA.

The Committee observed that save for the case of MEDS, KEMSA did not exhibit any prior or existing knowledge about the capabilities of the suppliers to deliver COVID-19 related items and further, no interrogation was undertaken by KEMSA to determine whether or not the suppliers met the eligibility criteria specified under section 55 of the PPADA and the requirements imposed by KEMSA for eligibility for the award of tender prior to the issuance of the commitment letters.

The Committee observed that there was a deliberate attempt by the CEO, KEMSA, and the management of KEMSA to defeat the application of the law with respect to the procurement of medical supplies in response to COVID-19. The CEO, KEMSA, abdicated his duties under the PPADA and PFMA in ensuring that the procurement processes were undertaken in a manner that was consistent with the PPADA. As a result, the CEO put the entity at risk of financial loss and exposure to low safety standards through the receipt of goods that may not have been of the required standards and quality.

### **3.7 Types of procurement processes undertaken**

#### **3.7.1 Summary of procurements undertaken and types of procurement methods adopted**

The Committee undertook a review of the procurements undertaken by the KEMSA for purposes of procuring items in response to COVID-19 and noted that most procurements were undertaken on an emergency basis pursuant to section 103 of the PPADA.

The Committee took note of section 103 of the PPADA which provides for circumstances under which direct procurements may be undertaken as follows –

- (1) A procuring entity may use direct procurement as allowed under sub-section (2) as long as the purpose is not to avoid competition.*
- (2) A procuring entity may use direct procurement if any of the following are satisfied---*
  - (a) the goods, works or services are available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods, works or services, and no reasonable alternative or substitute exists;*
  - (b) due to war, invasion, disorder, natural disaster or there is an urgent need for the goods, works or services, and engaging in tendering proceedings or any other method of procurement would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;*

- (c) owing to a catastrophic event, there is an urgent need for the goods, works or services, making it impractical to use other methods of procurement because of the time involved in using those methods;*
- (d) the procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies shall be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question;*
- (e) for the acquiring of goods, works or services provided by a public entity provided that the acquisition price is fair and reasonable and compares well with known prices of goods, works or services in the circumstances.*

The Committee, in its analysis of the tender documents, noted that the justification given by the Director, Procurement, KEMSA, for the adoption of the direct procurement method was, as follows –

*Section 103(1) of the PPADA allows for the use of direct procurement as per subsection (2) provided that the purpose is not to avoid competition. Subsection (2) provides as follows –*

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

*(a) ...*

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

*(c) owing to a catastrophic event, there is an urgent need for the goods, works or services, making it impractical to use other methods of procurement because of the time involved in using those methods; ...*

*Section 69(2) which provides for retrospective approval of procurements in response to an urgent need.*

Regulation 62 of the then applicable Public Procurement and Disposal Regulations, 2006, made further provision for the conduct of direct procurements as follows –

*(1) A procuring entity that conducts procurement using the direct procurement method pursuant to section 74 of the Act shall be subject to the procurement thresholds set out in the First Schedule.*

*(2) Where a procuring entity uses direct procurement, the procuring entity shall record the reasons upon which it makes a determination that the relevant condition set out in section 74 of the Act has been satisfied.*

*(3) A procuring entity shall, within fourteen days after the notification of the award of the contract, report any direct procurement of a value exceeding five hundred thousand shillings to the Authority.*

*(4) The procedure for negotiations for proposals set out in Regulation 58 shall apply mutatis mutandis to negotiations relating to direct procurement pursuant to section 75(a) of the Act.*

*(5) A procuring entity shall not enter into a contract under section 75 (c) of the Act unless it is satisfied that the offer-*

*(a) meets the requirements of the procuring entity as specified under paragraph (2); and*

*(b) is at the prevailing real market price.*

The Committee took note of section 69 of the PPADA which provides for the retrospective operation of procurements as follows –

*(1) No procurement approval shall be made to operate retrospectively to any date earlier than the date on which it is made except on procurements in response to an urgent need.*

In the submissions to the Committee by KEMSA during meeting held on 28<sup>th</sup> August, 2020, the chairperson, KEMSA, indicated that given that COVID-19 was declared a pandemic on or about 15<sup>th</sup> March, 2020 and that given that this was an emergency, it followed that the procurement processes undertaken in response to COVID-19 were undertaken on an emergency basis pursuant to section 103 of the PPADA. He further stated that they had sought and obtained from the Solicitor General and the Public Procurement and Regulatory Authority, an opinion on the use of direct procurement for the purpose of procuring commodities in response to COVID-19.

The chairperson, KEMSA, confirmed that the procurements were not advertised in the normal way or through the Government tender platform (MyGov.Kenya) owing to the emergency. Section 45(3)(c) of the Public Procurement and Asset Disposal Act provides that *“all procurement processes shall be undertaken in strict adherence to Article 227 of the Constitution”*. Article 227(1) of the Constitution further provides that *“when a state organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective”*. The procurement processes undertaken by KEMSA during the Covid-19 pandemic was neither transparent nor competitive. KEMSA never advertised their intention to procure the various medical items in response to the pandemic. This highly interfered with the competitiveness of the procurement processes.

In response to issues raised by the Committee, the Ag. CEO KEMSA, vide the letter dated 9<sup>th</sup> October, 2020, stated that KEMSA did not advertise tenders due to the “challenges posed by the outbreak of Covid-19”. The Committee however noted that no attempt was made by KEMSA to make use of electronic media or other online forms of advertisements.

The Committee noted the submissions by the CEO, KEMSA, to the Committee that the existing law did not provide an adequate framework for the procurement of goods, works or services in the case of an emergency as was the case with respect to the COVID-19 pandemic. As a result, KEMSA relied on the advisory issued by the Solicitor General to procuring entities and further, on the guidelines issued by the Director, Procurement in KEMSA issued on 24<sup>th</sup> April, 2020 to guide the management in the retrospective procurement of the COVID-19 related items. However, it was noted by the Auditor General

that by the time the Director of Procurement issued the guidelines, commitment letters to the tune of Kshs. 3.997 billion had been issued to various suppliers of COVID-19 related items. The Auditor General further noted that the guidelines required KEMSA to ensure that the prices at which the items were procured were reasonable and within the existing market prices. As noted by the Auditor General and the Committee in the review of the tender documentation and submissions by the management of KEMSA, this was not done.

The Committee further noted that despite the fact that the COVID-19 pandemic continued well into June, 2020, KEMSA did not, during the intervening and the period after the initial emergency procurements, carry out a market survey, needs assessment or even adopt alternative forms of procurements to ensure value for money. Ag. CEO, KEMSA, confirmed in the letter ref. KEMSA/CEO/PROC/ADM/2020 dated 9<sup>th</sup> October, 2020 addressed to the Senate, that direct procurements were undertaken between March, 2020, and May, 2020 and that no alternative forms of procurements were adopted.

#### **Committee observations**

The Committee observed that given that COVID-19 was a pandemic requiring urgent intervention, and hence the management appropriately relied on section 103 of the PPADA for the direct procurement of the items

The Committee further observed that most procurements carried out into the month of May, 2020 were carried out on the basis of section 103 of the PPADA. The Committee however noted that whereas the initial procurements were undertaken on an emergency basis these should have been undertaken as a stop gap measure to meet the urgent need and further, that KEMSA should have subsequently adopted alternative forms of procurement and concurrently, undertaken various processes including a rapid market survey and needs assessment in order to ensure value for money. In particular, the Committee noted that section 104 of the PPADA imposes a requirement on the accounting officer of a public entity to adhere to various requirements in undertaking a direct procurement as follows –

*An accounting officer of a procuring entity shall adhere to the following procedures with respect to direct procurement –*

- (a) issue a tender document which shall be the basis of tender preparation by tenderer and subsequent negotiations;*
- (b) appoint an ad hoc evaluation committee pursuant to section 46 to negotiate with a person for the supply of goods, works or non-consultancy services being provided;*
- (c) ensure appropriate approvals under this Act have been granted;*
- (d) ensure the resulting contract is in writing and signed by both parties.*

The Committee further observed that the framework provided for the carrying out of direct procurements under the PPADA was not clear as to how the process was to be undertaken in the case of an emergency particularly where no market survey or needs assessment had been undertaken prior to the emergency. Whereas section 69 of the PPADA provides for the retrospective operation of approvals in the case of procurements undertaken where an urgent need exists, no framework exists to guide the manner in which this provision would be effected. In addition, the Public Procurement and Disposal Regulations, 2006, which were applicable at the time, did not make provision for the retrospective operation of procurement approvals.

### **3.7.2 Tender opening and evaluation**

Section 78 of the PPADA provides as follows -

*(1) An accounting officer of a procuring entity shall appoint a tender opening committee specifically for the procurement in accordance with the following requirements and such other requirements as may be prescribed—*

- (a) the committee shall have at least three members; and*
- (b) at least one of the members shall not be directly involved in the processing or evaluation of the tenders.*

*(2) Any bid withdrawn in writing shall not be eligible for evaluation or consideration in the tender process.*

(3) *Immediately after the deadline for submitting tenders, the tender opening committee shall open all tenders received before that deadline.*

(4) *Those submitting tenders or their representatives may attend the opening of tenders.*

(5) *The tender opening committee shall assign an identification number to each tender and record the number of pages received.*

(6) *As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register—*

- (a) the name of the person submitting the tender;*
- (b) the total price, where applicable including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed; and*
- (c) if applicable, what has been given as tender security.*

(7) *No tenderer shall be disqualified by the procuring entity during opening of tenders.*

(8) *The accounting officer of a procuring entity shall, on request, provide a copy of the tender opening register to a person submitting a tender.*

(9) *Each member of the tender opening committee shall—*

- (a) sign each tender on one or more pages as determined by the tender opening committee; and*
- (b) initial, in each tender, against the quotation of the price and any modifications or discounts, where applicable.*

(10) *The tender opening committee shall prepare tender opening minutes which shall set out—*

- (a) a record of the procedure followed in opening the tenders; and*
- (b) the particulars of those persons submitting tenders, or their representatives, who attended the opening of the tenders.*

(11) *To acknowledge that the minutes are true reflection of the proceedings held, each member of the tender opening committee shall—*

- (a) initial each page of the minutes;*

*(b) append his or her signature as well as initial to the final page of the minutes indicating their full name and designation.*

*(12) A person who causes the physical loss of tender documents provided for under this section commits an offence.*

Documents provided by KEMSA indicate that indeed tender opening committees were appointed by the CEO, KEMSA, for the tenders that were executed by KEMSA. The Committee however noted that most of the tender opening committees were appointed after the suppliers had already delivered the respective items to the KESMA warehouses.

The Committee also took note of section 46 of the PPADA provides as follows –

*(1) An Accounting officer shall ensure that an ad hoc evaluation committee is established in accordance with this Act and Regulations made thereunder and from within the members of staff, with the relevant expertise.*

*(2) In establishing the ad hoc evaluation committee referred to in subsection (1) above, the procuring entity that is a State department or a county department, shall do so in consultation with the Cabinet Secretary or the county executive committee member responsible for that entity, as the case may be.*

*(3) Despite subsection (1), where technical expertise is required from outside the organisation, such expertise may be obtained from other procuring entities or procured to join the committee, on recommendation, in writing, by the head of the procurement function, and the committee shall be appointed by the accounting officer, in writing.*

*(4) An evaluation committee established under subsection (1), shall—*

*(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;*

*(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.*

*(5) For greater certainty a procuring entity shall where a member of the ad hoc evaluation committee contravenes any provisions of this Act, institute disciplinary measures in accordance with the procuring entity's disciplinary measures and the provisions of this Act.*

*(6) Where a public entity lacks capacity to comply with this Act an accounting officer shall seek assistance from the National Treasury.*

*(7) Subject to this Act, the evaluation committee may invite external technical experts who are not employees of the organisation to assist in matters that need specific technical expertise.*

*(8) Notwithstanding the provisions in this section, the Cabinet Secretary may prescribe other procedures for evaluating low value procurements below specified thresholds.*

The Committee, in its analysis of the tender documents, noted that indeed the CEO, KEMSA established ad hoc evaluation committees for the tenders submitted to KEMSA. The Committee however observed that these were established after the suppliers had delivered the respective items to the KEMSA warehouses. Hence, the evaluations and subsequent negotiations that were undertaken were done after the goods had already been received by KEMSA.

#### **Committee observations**

The Committee observed that the establishment of the tender evaluation committees was a mere formality as they worked retrospectively. This is because the items being tendered had been delivered to KEMSA warehouses before the tender opening and evaluation processes

had been undertaken. Indeed, the only function the evaluation committees seemed to try to accomplish was to negotiate the prices of the items being procured. The Committee, as earlier observed under 3.4 (Market Survey and pricing), noted that no substantive negotiations were conducted in the procurement process. The prices seem to have been agreed upon before the procurement process was initiated and the purported negotiation seemed to just be a formality.

The Committee further observed that section 46(4)(e) of the PPADA requires an evaluation committee to adopt a process that shall ensure the evaluation process utilized adheres to Articles 201(d) and 227(1) of the Constitution. The Committee observed that the evaluation committees established to evaluate tenders for supply of goods in response to the COVID-19 pandemic did not adhere to this provision. Article 227(1) of the Constitution provides that “*when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective*”. The Committee observed that the procurement processes were not transparent, competitive or cost-effective.

### **3.7.3 Delivery of supplies, inspection and acceptance**

From the analysis of the documents submitted by the suppliers and KEMSA, it is clear that delivery of various medical items was done at KEMSA warehouses. Various suppliers furnished the Committee with various delivery notes confirming delivery of various medical items to KEMSA warehouses. Emails from KEMSA warehouse managers also confirm delivery of various medical items by various suppliers.

Section 48 of the PPADA provides as follows –

*(1) An accounting officer of a procuring entity may establish an ad hoc committee known as the inspection and acceptance committee.*

*(2) The inspection and acceptance committee shall be composed of a chairman and at least two other members appointed by the accounting officer or the head of the procuring entity on the recommendation of the procuring unit.*

*(3) The inspection and acceptance committee shall immediately after the delivery of the goods, works or services—*

- (a) inspect and where necessary, test the goods received;*
  - (b) inspect and review the goods, works or services in order to ensure compliance with the terms and specifications of the contract; and*
  - (c) accept or reject, on behalf of the procuring entity, the delivered goods, works or services.*
- (4) The inspection and acceptance committee shall—*
- (a) ensure that the correct quantity of the goods is received;*
  - (b) ensure that the goods, works or services meet the technical standards defined in the contract;*
  - (c) ensure that the goods, works or services have been delivered or completed on time, or that any delay has been noted;*
  - (d) ensure that all required manuals or documentation has been received; and*
  - (e) issue interim or completion certificates or goods received notes, as appropriate and in accordance with the contract.*

KEMSA did not provide information regarding the establishment of an inspection and acceptance committee for each of the procurements undertaken in response to the COVID-19 pandemic. In response to issues raised by the Committee, the Ag. KEMSA CEO, vide a letter dated 9<sup>th</sup> October, 2020 addressed to the Senate, stated that CEO, KEMSA did not establish inspection and acceptance committees for each procurement. In lieu thereof, the Ag. CEO stated that KEMSA has an established inspection and acceptance committee comprising a pool of sixty officers. He further stated that officers are picked from the pool to undertake inspection of goods from time to time. This was also noted by the PPRA in the course of its investigations in which it noted that the CEO, KEMSA, had appointed an inspection and acceptance committee in FY 2018/2019 consisting of sixty-one members on a permanent basis and further, that this was contrary to section 48(1) of the PPADA.

#### **Committee observations**

The Committee observed that while section 48 of the PPADA provided for the establishment of an inspection and acceptance committee by a procuring entity, KEMSA had in place, a pool of sixty officers appointed on a permanent basis to undertake all inspections and acceptance of procured goods. Section 48(2) of the Act provides that an inspection and

acceptance committee shall be composed of a chairman and at least two other members. The Committee observed that the manner in which KEMSA appointed the inspection and acceptance committee was not consistent with section 48(2) of the Act.

#### **3.7.4 Quality of procured supplies**

The Committee noted the submissions by some of the Directors of companies regarding the quality of the product to be supplied prior to the delivery of the items. During the meetings held on 2<sup>nd</sup> and 7<sup>th</sup> December, 2020, the Committee was informed by Mr. James Cheluley, Director, Shop 'N' Buy Limited that the company sent samples of items to be procured to KEMSA who inspected and approved their quality. He stated that during delivery the items were checked to confirm compliance with the samples. Similarly, Mr. Titus Ibui, Director, Bell Industries Limited, informed the Committee during the meeting held on 14<sup>th</sup> December, 2020, that they also sent samples to KEMSA who confirmed their quality. This was also the case with Briema Grain Stores Limited who, through their Director Mr. Abdighafar Ali who appeared before the Committee on 3<sup>rd</sup> and 11<sup>th</sup> 14<sup>th</sup> December, 2020, informed the Committee that they too sent samples to KEMSA who inspected and accepted the samples before delivery of the items.

The Committee further noted the submissions by the Hon. Wycliffe Oparanya, the chairperson, COG regarding the quality of the products supplied by KEMSA to the county governments. In particular, COG noted that KEMSA supplied items that are of reasonably good quality except in isolated cases. COG highlighted the following issues with respect to PPEs that had been procured through KEMSA –

- (a) some of the PPEs were of poor quality which included mislabels while some were porous and would allow fluids to get in to contact with the users;
- (b) poor quality 3 ply surgical face masks; and
- (c) some the masks were labelled as non-medical and were thick thereby affecting the ability of the users to breath while wearing them.

In addition, the chairperson, COG, informed the Committee that KEMSA had previously supplied county governments with pharmaceutical and non-pharmaceutical products with a short shelf life thereby forcing the counties to seek alternative sources of products with a

longer shelf life and incur losses for the expired products. The chairperson also raised concerns the following regarding the requirement under section 4(3) of the KEMSA Act which imposes a restriction on county governments to procure medical supplies only from KEMSA–

- (a) it jeopardizes health service delivery in counties in light of the fact that KEMSA is unable to fully meet the demands of county governments;
- (b) it does not assure value for money as the cost of items bought from KEMSA are sometimes double the market cost i.e. PPEs purchased through KEMSA cost Kshs. 12,000 whereas the same are sold for Kshs. 3,000; and
- (c) the quality of items purchased through KEMSA is low.

The Committee noted the observations of PPB regarding compliance with the relevant standards of quality, safety and efficacy. In particular, the CEO, PPB, Dr. Fred M. Siyoi noted that the imports that had been made by KEMSA following the issuance of two hundred and forty-three import permit applications between March and August, 2020 met the requisite standard requirements.

The Committee further made reference to the submissions made by the Managing Director, KEBS, Rtd. Lt. Col. Bernard Njiraini, to the Senate *Ad Hoc* Committee on the Covid-19 situation in Kenya on 7<sup>th</sup> May, 2020. In the meeting, the Managing Director informed the *Ad Hoc* Committee that KEBS did not have standards to support local production of HPTs necessary in the fight against COVID-19 pandemic before the declaration of the pandemic. He went on to state that the Bureau proceeded with speed after the declaration of the pandemic and developed standards that would support local production of the necessary health products and technologies which include face masks, PPEs, critical care ventilators among others.

The Managing Director, KEBS, further informed the *Ad Hoc* Committee that KEBS conducted market surveillances to monitor the quality of the products at the points of sale to give an assurance to consumers that the products they purchase or procure at the points of sale were safe. KEBS thereafter shared information on non-compliant products with relevant government agencies and published the same in print media.

The Managing Director, KEBS, further informed the Standing Committee on Health and the Ad hoc Committee on the COVID-19 Situation in Kenya during a meeting held on 24<sup>th</sup> September, 2020, that all products imported or locally manufactured are subjected to thorough quality checks and certification processes before they are allowed into the market. He further informed the Committees that where goods were subjected to standards and failed to meet the minimum quality and performance requirements, such goods were rejected and re-shipped or destroyed at the owner's cost. Hence according to him, the quality of locally manufactured products is assured through the KEBS Product Certification Scheme which is in line with ISO 17065 conformity assessment requirements for bodies certifying products, processes and services.

The CEO, PPB, Dr. Fred M. Siyoi also informed the Committees during the meeting held on 14<sup>th</sup> September, 2020, that information available on the Board's import records for the period ranging from 1<sup>st</sup> March, 2020 to 31<sup>st</sup> August, 2020 indicated that a total of two hundred and forty-three import permit applications had been made by KEMSA and that the Board had confirmed that products imported vide the said import applications had met the requisite requirements of safety, quality and efficacy. He went on to state that the Board, since the advent of the COVID-19 pandemic, has taken deliberate steps to ensure expeditious access and availability of safe, efficacious and good quality health products and technologies by implementing the Emergency Use Authorization Procedure and Compassionate Use.

The CEO, PPB, informed the Committees that the Board has robust mechanisms for assessing the quality of medical products to be placed on the Kenyan market through implementation of a marketing authorization process, control of imports and exports and post-market surveillance. However, the CEO further informed the Committees that the Board had received a Circular, OP/CAB 9/83A dated 4<sup>th</sup> June 2019, recategorizing partner government agencies at the ports of entry. This recategorization meant that the Board could not operate from the ports of entry and intervention of consignments for verification was dependent on the grant of permission by the lead port agencies i.e. KRA and KEBS. This, according to the CEO, has greatly hampered the work of the Board at the ports of entry and left PPB heavily reliant on post market surveillance activities to determine the safety and quality of goods. He further stated that unhindered intervention at the ports of entry was critical in safeguarding public health.

### **Committee observations**

The Committee observed that the requirement under section 4(3) of the KEMSA Act that was introduced vide the Health Laws (Amendment) Act, 2019, has since been declared unconstitutional by the High Court in Constitutional Petition No. 284 of 2019. In this case, COG (the 5<sup>th</sup> petitioner) sought a declaration that the amendment to section 4 of the Kenya Medical Supplies Authority Act were unconstitutional. In particular, COG argued that the amendment would put the provision of health services by county governments in jeopardy as KEMSA had never been able to meet 100% of the orders placed by county governments. COG further argued that the amendment was not subjected to public participation and further, that the Bill was not submitted for consideration by the Senate contrary to Articles 96(1) and 110(4) of the Constitution. In this case, the Court made an order, *inter alia*, that “*a declaration be and is hereby issued that the amendments to section 4 of the Kenya Medical Supplies Act is contrary to Articles 6, 10, 43(1), 46(1) 73(1), 110(3), 189(1), and 227(1) of the Constitution and is therefore unconstitutional thus null and void.*”

The Committee noted with concern that the PPB was unable to undertake some of its key functions due to the said circular restricting its access to ports of entry. This, the Committee observed may have contributed to the proliferation of substandard medical supplies in the country. PPB ought to be given access to ports of entry to enable it execute its statutory functions.

The Committee also observes that KEMSA appears not to have set quality standards for most items procured in response to the pandemic, particularly the PPEs. The Committee noted that KEMSA seemed to call for samples from potential suppliers without specifying the quality and inspecting them to make sure the items were of the proper quality. It is not clear which parameters KEMSA used to confirm the samples were of the proper quality

### **3.8 Qualification and ability of companies to supply**

The Committee noted the requirement by KEMSA, in the business questionnaire contained in tender documents, for an applicant for an award for tender to submit commercial references

of customers that had done business with the applicant in the last three years from the date of tender. This, the Committee observed, would have required a company to have been in business for a period of over three years for it to have qualified for the tender, in addition to meeting the other requirements.

The Committee noted the information submitted by the Business Registration Service in the Office of the Attorney General and Department of Justice regarding the registration details of companies that had been awarded tenders to supply KEMSA with various medical supplies. The Committee further noted that some of the companies that had been registered for a period of less than three years prior to the award of tender as follows –

**Table 18: Companies registered for less than a period of three years prior to the award of tender**

No.	Company	Date of registration
1.	Caresha Healthcare Solutions Limited	22 <sup>nd</sup> June, 2018
2.	Shop 'N' Buy Limited	14 <sup>th</sup> February, 2020
3.	Regal Freighters Limited	18 <sup>th</sup> April, 2018
4.	Zebra Investments Limited	14 <sup>th</sup> July, 2020
5.	Tikasan Holdings Co. Limited	27 <sup>th</sup> March, 2018
6.	Absa Chemicals Limited	18 <sup>th</sup> February, 2019
7.	Briema Grains Stores Limited	31 <sup>st</sup> January, 2019
8.	Nanopay Limited	22 <sup>nd</sup> August, 2019
9.	Accenture Limited	29 <sup>th</sup> March, 2019
10.	Bennetts Ventures Limited	13 <sup>th</sup> September, 2018
11.	Ohiyo Company Limited	23 <sup>rd</sup> November, 2018
12.	Trade Soft Limited	3 <sup>rd</sup> May, 2017
13.	Hamethyst Limited	3 <sup>rd</sup> May, 2017
14.	Teleflex Medical Technologies Limited	3 <sup>rd</sup> December, 2017
15.	Nel Limited	12 <sup>th</sup> September, 2017
16.	Aszure Commercial Services Limited	9 <sup>th</sup> February, 2017

The Committee also noted the corresponding findings of the Auditor General in the report to the Committee regarding some companies that had been awarded tenders as follows –

**Table 19: Companies registered for less than a period of three years prior to the award of tender**

No.	Name of company	Date of registration	Award
1.	Shop 'N' Buy Limited	14 <sup>th</sup> February, 2020	KN95 facemask and PPEs of a contract value of Kshs. 970 million
2.	Kilig Limited	22 <sup>nd</sup> January, 2020	PPEs of a contract value of Kshs. 9 million
3.	Nanopay Limited	22 <sup>nd</sup> August, 2019	KN95 facemask of a contract value of Kshs. 34.79 million

In particular, the Auditor General noted that –

- (a) some companies had been registered for a period of less than one year and yet had been awarded tenders as set out under table 10; and
- (b) the companies could not have been deemed to have the necessary qualification and experience in the supply of specialised medical equipment or products.

During a committee meeting held on 2<sup>nd</sup> December, 2020, Mr. James Cheluley, Director, Shop 'N' Buy Limited, informed the Committee that indeed Shop 'N' Buy Limited was less than three months old when it was issued commitment letters to supply medical items to KEMSA. The Director confirmed to the Committee that the company had no engagements with KEMSA prior to the declaration of the COVID-19 pandemic.

The Committee also noted the information submitted by the Mr. Abdighafar Ali, the Managing Director of Briema Grains Stores Limited, regarding the tender awarded to it by KEMSA for the supply of 200,000 pieces of KN95 masks on 28<sup>th</sup> April, 2020, at a total price of Kshs. 140,000,000 and 6,000 packs of surgical face masks 3-ply on 4<sup>th</sup> May, 2020, at a total price of Kshs. 27,000,000 for which they have been paid. In particular, the Committee noted the statement by Mr. Ali that the company had not had any previous engagements with KEMSA prior to the declaration of the pandemic and further that they had never supplied KEMSA with any medical items before. The Committee also noted Mr. Ali's statement to the effect that the company had two years of experience as a supplier. The Committee however noted from the information submitted by the Office of the Attorney General that the company had been registered on 31<sup>st</sup> January, 2019, slightly over a year prior to the tender award and

further, had no experience in the field of medical supplies. The Committee also noted that all documentation it had indicated that Briema Grain Stores Limited engaged in the business for which they were not incorporated for.

The Auditor General also made the following findings with respect to some of the companies that were awarded tenders –

**Table 20: Findings regarding companies that awarded tenders**

No.	Irregularity	Total Amount awarded (Kshs.)
1.	Engagement in business for which the supplier was not incorporated for	871,640,000
2.	Inability of the supplier to financially execute the contract	
3.	Technical incapability and experience on the part of the directors to supply medical commodities	
4.	Inadequate experience in the market/industry	
5.	Engaging un-prequalified suppliers	

**Committee observations**

The Committee observed that KEMSA failed to carry out a due diligence on the companies to determine whether they met the criteria for the award of tender and further, their ability to delivery on the items proposed to be procured. The Committee further observed that by failing to do so, the CEO, KEMSA and the board of management put KEMSA in a precarious position regarding the timely delivery of goods and the quality of the items delivered.

**3.9 Warehousing and distribution**

Section 4(1)(a), (b) and (c) of the Kenya Medical Supplies Authority Act provides as follows–

*(1) The functions of the Authority shall be to—*

- (a) 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;*
- (b) establish a network of storage, packaging and distribution facilities for the provision of drugs and medical supplies to health institutions;*
- (c) enter into partnership with or establish frameworks with county Governments for purposes of providing services in procurement, warehousing, distribution of drugs and medical supplies.*

The Committee, upon the conduct of the site visit to the KEMSA warehouse on 1<sup>st</sup> December, 2020, was informed by the Ag. CEO, KEMSA, that the Authority warehoused drugs and other medical supplies for the National Government. This included the warehousing of medical supplies procured and donated in response to Covid-19 pandemic. Ag. CEO further informed the Committee that all medical supplies donated to the National Government to assist the country in the fight against the Covid-19 pandemic were channelled through the MoH which used KEMSA to store and distribute the supplies in line with its statutory mandate. He advised that KEMSA stored the medical supplies and distributed all of them in accordance with the distribution lists provided by the MoH.

During the said site visit, the Ag. CEO, informed the Committee that the KEMSA warehouses still held large volumes of stock procured in response to the pandemic. He stated that KEMSA had been unable to sell most of the stock to counties and other entities because the market price for the supplies was less than their cost and selling them at market price would lead to substantive losses. He advised that as at the date of the meeting, i.e. 1<sup>st</sup> December, 2020, KEMSA had accumulated a loss of more than Kshs. 2,000,000,000 that had accrued due to the reduction of the value of the medical supplies they had in their warehouses and that the amount in terms of the loss increased with each passing day. Further and according to the Auditor General, KEMSA had procured stock between the months of March and July, 2020, at Kshs. 7,632,068,588 out of which stock valued Kshs. 6,279,531,019 still remained at KEMSA warehouses as at September, 2020.

#### **Committee observations at the meeting**

At the tail-end of the KEMSA warehouse site visit by the Committee, the Committee advised KEMSA to seek the approval of its Board and MoH to enable it sell the medical supplies at its warehouses at prevailing market rates. This would not only stave off any further losses to KEMSA but also ensure that the much needed medical supplies are availed to counties and all other medical institutions.

**CHAPTER 4 COMMITTEE RECOMMENDATIONS**

Following the analysis and observations made, the Committee makes the following recommendations-

NO.	RECOMMENDATION	ACTOR	TIMELINE UPON ADOPTION OF REPORT	SENATE OVERSIGHT COMMITTEE
1.	<p>That the ODPP and DCI investigate the CEO, KEMSA, and the board of management of KEMSA for contravening the following provisions –</p> <ul style="list-style-type: none"> <li>(k) Article 226 and 227 of the Constitution for the approval of use of public funds contrary to law;</li> <li>(l) Section 44 and 45(3)(d) of the PPADA for failing to ensure that there was in place an approved budget prior to undertaking the procurement processes;</li> <li>(m) Section 48 of the PPADA on the appointment of an inspection and acceptance committee for each procurement;</li> <li>(n) Section 52(3) and (4) of the PPADA for failing to utilize the register list of another State organ where it found the Kenya Essential Medical List to be insufficient to cater for its procurement needs;</li> <li>(o) Section 53(8) and (9) of the PPADA which prohibits an accounting officer for commencing the procurement processes without the existence of sufficient funds to meet the obligations of the resulting contract as reflected in its</li> </ul>	ODPP, DCI	Within 1 month	Committee on Health

NO.	RECOMMENDATION	ACTOR	TIMELINE UPON ADOPTION OF REPORT	SENATE OVERSIGHT COMMITTEE
	<p>approved budget estimates</p> <p>(p) Section 73 of the PPADA and regulation 22 of the Public Procurement and Disposal Regulations, 2006 for failing to initiate the procurements through purchase requisitions from the user departments;</p> <p>(q) Regulation 8(3)(z) of the Public Procurement and Disposal Regulations, 2006, for failing to carry out periodic market surveys;</p> <p>(r) Regulation 20(2) of the Public Procurement and Disposal Regulations, 2006, for failing to integrate its procurement plan with the budget;</p> <p>(s) Regulation 43(b) and 54 of the PFM (National Government) Regulations, 2015 for failing to safeguard the resources entrusted in them and ensuring that they are applied for the purpose for which they were appropriated; and</p> <p>(t) Regulation 51 of the PFM (National Government) Regulations, 2015, for committing funds without an approved procurement plan and budget.</p> <p>Officers to be investigated include but are not limited to:</p> <p>(i) Dr. Jonah Manjari, CEO, KEMSA;</p> <p>(ii) Charles E. Juma; Director, Procurement, KEMSA;</p> <p>(iii) Mr. Eliud Mureithi, Director,</p>			

NO.	RECOMMENDATION	ACTOR	TIMELINE UPON ADOPTION OF REPORT	SENATE OVERSIGHT COMMITTEE
	<p>Commercial Services, KEMSA;</p> <p>(iv) Mr. Fredrick Wanyonyi Corporation Secretary/Director, Legal Services, KEMSA;</p> <p>(v) Mr. Edward Njoroge, Director, Operations, KEMSA;</p> <p>(vi) Mr. Waiganjo Karanja, Director, Finance and Strategy, KEMSA; and</p> <p>(vii) any other officer of KEMSA who was involved in the procurement processes and who is, upon investigation, is found culpable.</p>			
2.	<p>That the ODPP and DCI investigate the companies (set out in annex 2) that were awarded tenders by KEMSA to determine if there was any collusion between the CEO, KEMSA, the board of management of KEMSA and the directors of the companies in contravention of the PPADA and the PFMA and the debarment of any company found liable.</p>	ODPP, DCI	Within 1 month	Committee on Health
3.	<p>The State Corporation Advisory Committee undertake an audit into the conduct of the Board of Directors of KEMSA and the board of management of KEMSA in accordance with section 27 of the State Corporations Act and make recommendations to the President and the CS, MoH, on the measures required to be put in place to ensure the effective management and</p>	State Corporation Advisory Committee	3 months	Committee on Health

NO.	RECOMMENDATION .	ACTOR	TIMELINE UPON ADOPTION OF REPORT	SENATE OVERSIGHT COMMITTEE
	functioning of KEMSA.			
4.	<p>The PPADA be reviewed to –</p> <p>(a) provide an elaborate framework for the conduct of a rapid market survey in the case of an emergency procurement where the existing survey in a public entity is not reflective of the existing market environment;</p> <p>(b) provide for –</p> <p>(i) the publication of procurement plans by a public entity within five days of issuance of a tender in the company website and through such other media as shall be appropriate to ensure fairness and transparency and to provide for the publication of information regarding the various stages of the procurement cycle with respect to each tender;</p> <p>(ii) publish an annual procurement projection setting intentions and probable timing in the coming 24-month period, with some indication of the probability of the intended procurements;</p> <p>(iii) publish a complete list of current contracts with planned intentions for extension or market approach on a 24-month moving basis;</p> <p>(iv) report any significant variations to the procurement program in its annual report; and</p> <p>(v) the review of this initiative be</p>	Senate	6 months	Committee on Finance and Budget

NO.	RECOMMENDATION	ACTOR	TIMELINE UPON ADOPTION OF REPORT	SENATE OVERSIGHT COMMITTEE
	undertaken within one year of implementation to determine its efficacy.			
5.	Review of existing Regulations to provide for an elaborate framework for the conduct, by procuring entities, of emergency procurements and in particular, the implementation of section 103 of the PPADA by procuring entities.	CS, MoH	6 months	Committee on Finance and Budget
6.	Undertake an audit of the existing reporting structures, financial disclosure mechanisms and internal audit processes in KEMSA, identify any gaps and put in place measures to ensure effective oversight and collaboration between the Board of KEMSA, the management of KEMSA PS, MoH and the CS, MoH.	CS, MoH Board of KEMSA	6 months	Committee on Health
7.	The establishment of an information data base for public procuring entities and accessible by all persons containing information on –  (a) procurement needs and plans of all public procuring entities;  (b) existing supplier capabilities in the market; and  (c) the various types of procurement processes, the roles of procuring entities and suppliers and the various obligations imposed on various parties by existing legislation under the PPADA and PFMA.	PPRA	6 months	Committee on Finance and Budget
8.	That boards of management of public entities undergo a mandatory and continuous training on public	PPRA SACC	Within 1 year then annually	Committee on Health

NO.	RECOMMENDATION	ACTOR	TIMELINE UPON ADOPTION OF REPORT	SENATE OVERSIGHT COMMITTEE
	procurement and in particular, on the revised regulations on public procurement in Kenya.			
9.	Review the PPADA to strengthen the ability of the PPRA to enforce the provisions of the Act.	Senate	6 months	Committee on Finance
10.	The Circular, Ref; <i>OP/CAB 9/83A</i> dated 4 <sup>th</sup> June 2019 with respect to the Pharmacy and Poisons Board be revoked forthwith to allow access by PPB to the ports of entry and enable it execute its statutory mandate.	Head of Public Service	3 months	Committee on Health
11.	MoH to authorize KEMSA to dispose of medical items that were procured in response to the Covid-19 pandemic at prevailing market prices to stop the losses being incurred by KEMSA.	MoH EACC Auditor General	1 Week	Committee on Health
12.	The KEMSA Act, as it currently exists, be reviewed as per annex 3, to ensure that Counties are allowed to procure medical items from entities other than KEMSA.	Senate	6 months	Committee on Health

## ANNEXTURES

- Annex 1 Minutes of Committee Deliberations
- Annex 2 List of Companies that supplied KEMSA Covid-19 related items
- Annex 3 Proposed Amendment to the KEMSA Act
- Annex 4 Auditor General's Special Audit Report on utilization of COVID-19 Funds by KEMSA for the period 13<sup>th</sup> March – 31<sup>st</sup> July, 2020
- Annex 5 Report by the Public Procurement Regulatory Authority on the irregularities at KEMSA
- Annex 6 Letter by the CEO to the PS, MoH, dated 12<sup>th</sup> June, 2020, seeking approval to utilise the UHC funds to cater for expenses incurred in the procurement of COVID-19 related items
- Annex 7 Letter by the chairperson, KEMSA to the CS, MoH dated 20<sup>th</sup> August, 2020, on the utilization of the UHC funds by KEMSA
- Annex 8 Memo by Director of Procurement, KEMSA, to the board of management, KEMSA to cease carrying out procurements