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REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT – THIRD SESSION

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PUBLIC INVESTMENTS COMMITTEE

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THE REPORT ON THE INQUIRY INTO PROCUREMENT AND IMPLEMENTATION  
OF THE EXCISABLE GOODS MANAGEMENT SYSTEM FOR PRINTING, SUPPLY,  
AND DELIVERY OF SECURITY REVENUE STAMPS COMPLETE WITH TRACK  
AND TRACE SYSTEM, AND AN INTEGRATED PRODUCTION ACCOUNTING  
SYSTEM BY THE KENYA REVENUE AUTHORITY

Directorate of Committee Services  
National Assembly  
Parliament Buildings  
NAIROBI

APRIL, 2019

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## ABBREVIATIONS AND ACRONYMS

ACA	Anti-Counterfeit Agency
AG	Attorney General
CIAT	the Inter-American Centre of Tax Administrators
EGMS	Excisable Goods Management System
EOI	Expression of Interest
FCTC	Framework Convention on Tobacco Control
KAM	Kenya Association of Manufacturers
KEBS	Kenya Bureau of Standards
KEPSA	Kenya Private Sector Alliance
KRA	Kenya Revenue Authority
LN	Legal Notice
MP	Member of Parliament
NABAK	National Alcoholic Beverages Association of Kenya
OAG	Office of the Auditor General
PIC	Public Investments Committee
PPDA	Public Procurement and Disposal Act, 2005
PPOA	Public Procurement Oversight Authority
PPRA	Public Procurement Regulatory Authority (PPRA)
TOR	Terms of Reference
WHO	World Health Organization
ODM	Orange Democratic Movement
WDM-K	Wiper Democratic Movement of Kenya
JP	Jubilee Party
EFP	Economic Freedom Party
KANU	Kenya African National Union
FORD	Forum for Restoration of Democracy

## **CHAIRMAN'S FORWARD**

The Public Investments Committee is one of the three watchdog Committees in the National Assembly that examines reports of the Auditor-General laid before the National Assembly to ensure probity, efficiency and effectiveness in the use of public funds. The Committee is established pursuant to National Assembly Standing Order 206 to examine the working of public investments on the basis of their audited reports and accounts. This ensures implementation of Article 229(8) of the Constitution of Kenya, 2010 on reports laid before the House by the Auditor-General, which provides that, "*within three months after receiving an audit report, Parliament shall debate and consider the report and take appropriate action*".

The inquiry by the Public Investment Committee into the procurement process of the Excisable Goods Management System (EGMS) by the Kenya Revenue Authority (KRA) begun towards the end of the Eleventh Parliament. The inquiry was occasioned by widespread media reports on the alleged irregularities in the procurement process of the EGMS by the KRA. After a considerable inquiry into the matter, the Eleventh Parliament's PIC resolved to request the Auditor-General to conduct a special audit on the matter to enable the Committee to objectively conclude on the matter. By the time the special audit report was ready in July 2017; the term of the Eleventh Parliament came to an end and therefore, the matter could not be considered by the PIC then.

The PIC of the Twelfth Parliament begun considering the said Special Audit report and during the inquiry, the Committee met with the following- individuals and entities: the Commissioner General, Kenya Revenue Authority; the Chief Executive Officer of the Kenya Bureau of Standards; the Chief Executive Officer of the Kenya Anti-Counterfeit Agency; the Hon. Joshua Kutuny, Member of Parliament for Cherengani Constituency; the Management of SICPA Solutions SA in Switzerland; the Solicitor-General; the Management of the Kenya Association of Manufactures; Management of the Public Procurement Regulatory Authority (PPRA); and, the Office of the Auditor-General (OAG).

In its inquiry, the Committee sought to establish whether the whole procurement process was conducted in accordance with the provisions of the Public procurement and Asset Disposal Act 2005; whether Legal Notice No. 110 of June 2013 and Gazette Notice No. 12856 of 5<sup>th</sup> September, 2013 were passed in accordance with the provisions of the Statutory Instruments Act 2013 and whether the public got value for money from the whole process.


In October 2017, a public interest litigation (Petition No. 532 of 2017) was filed in the High Court relying heavily on the findings of the Special Audit Report. A judgment was rendered on 12<sup>th</sup> March, 2018 invalidating Legal Notice No.110 of June, 2013, Legal Notice No. 53 of 2018, Gazette Notice 12856 of 5<sup>th</sup> September, 2013 and the whole procurement process of the EGMS by the KRA. The matter has since been appealed and is pending before Court. It is important to note that the prayers sought in the petition were largely similar to the Committee's Terms of Reference.

This Report contains submissions by all the individuals that appeared before the Committee; observations and recommendations arising from the inquiry.

The Committee records its appreciation to the Offices of the Speaker and the Clerk of the National Assembly for the support accorded to enable it undertake its mandate successfully. The Committee further extends its appreciation to the Office of the Auditor- General for the services they offered the Committee during the entire inquiry and also thanks all the witnesses who appeared before it for the purposes of adducing evidence.

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

On behalf of the Public Investments Committee, and pursuant to National Assembly Standing Order 199(6), it is my pleasant duty and honour to present this report on the *"Inquiry into Procurement and Implementation of the Excisable Goods Management System for Printing, Supply, and Delivery of Security Revenue Stamps Complete With Track and Trace System, and an Integrated Production Accounting System by the Kenya Revenue Authority"* for consideration and adoption.



**HON. ABDULLSWAMAD SHARRIF NASSIR, MP**  
**CHAIRPERSON, PUBLIC INVESTMENTS COMMITTEE**

## **EXECUTIVE SUMMARY**

### ***Background Information***

The inquiry by the Public Investment Committee (PIC) into the procurement process and implementation of the Excisable Goods Management System (EGMS) by the Kenya Revenue Authority (KRA) began towards the end of the Eleventh Parliament. This was occasioned by widespread reports on alleged irregularities in the procurement process of the EGMS. After an initial inquiry into the matter, PIC of the Eleventh Parliament resolved to request the Auditor-General to conduct a Special Audit on the matter to enable the Committee objectively consider the matter. By the time of completion of the Special Audit, the term of the Eleventh Parliament had come to an end and therefore, PIC could not consider the matter. The matter was therefore taken up by the successor PIC of the Twelfth Parliament.

In the said Special Audit Report, the Auditor-General observed that there were irregularities in the procurement process of the EGMS with respect to:

- (a) alteration of substance of the Expression of Interest (EOI) contrary to section 59(3) of the Public Procurement and Asset Disposal Act 2005;
- (b) failure to ensure availability of sufficient funds prior to initiating procurement proceedings contrary to section 26(6) of the Public Procurement and Asset Disposal Act 2005; and,
- (c) failure to submit Legal Notice No. 110 of 2013, Gazette Notice No. 12856 of 2013 to the National Assembly for approval in line with the provisions of the Statutory Instrument Act, 2013.

### ***Petition No. 532 of 2017***

On 19<sup>th</sup> October 2017, Mr. Okiya Omtatah Okoiti filed a Petition No. 532 of 2017 in the High Court against the Commissioner General of KRA, the Cabinet Secretary for the National Treasury and SICPA Solutions SA (“SICPA”) - the Swiss firm that had been awarded a tender by KRA to implement EGMS. In his petition, Mr. Okiya Omtatah faulted the legality of both Legal Notice No. 110 of 18<sup>th</sup> June 2013 and Gazette Notice No. 12856 of 5<sup>th</sup> September, 2013 for falling short of the constitutional requirements of public participation and compliance with procurement process of the impugned EGMS by the KRA. The issues raised for determination in

the said Petition were essentially similar to the Terms of References (ToRs) under which the Auditor General prepared the Special Audit. These issues were-

- (a) whether there was adequate public participation in the enactment of the impugned Gazette notices and in the decision to acquire and implement the EGMS;*
- (b) whether KRA violated the law governing direct procurement in awarding the tender to SICPA;*
- (c) whether the impugned legal instruments were void on grounds that they were enacted in a manner that violated the Constitution and the Statutory Instruments Act;*
- (d) whether the imposition of the tax created an unfair tax burden on the public and the manufacturers and whether it offended the provisions of Article 43 (1) (a),(c), & (d) of the Constitution; and,*
- (e) whether the EGMS system duplicated functions of KEBS and the Anti-Counterfeit Agency.*

The High Court rendered its judgment and determined *inter alia* that, KRA violated the provisions of the Statutory Instruments Act 2013 in procuring the EGMS by not undertaking public participation exercise on the regulations and directly procuring the EGMS. This offended the provisions of Public Procurement and Disposal Act 2005. The imposition of exercise duty of (Kshs 1.50)/= was bound to have an impact on the rights to clean water in adequate quantities as provided for under Article 43 (1)(d) of the Constitution.

From the above findings, the Court, in line with the provisions of Article 23(3) of the Constitution declared that-

- (a) the repealed Legal Notice No. 110 of 18<sup>th</sup> June, 2013 and Gazette Notice No. 12856 of 5<sup>th</sup> September 2013 were enacted in a manner inconsistent with the provisions of the Constitution and the Statutory Instruments Act, hence they were null and void;*
- (b) the Legal Notice No. 53 of 30<sup>th</sup> March, 2017 was enacted in a manner that was inconsistent with the provisions of the Constitution and the Statutory Instruments Act in that there was no adequate public participation prior to its enactment, hence the same is null and void;*
- (c) Legal Notice Number 53 of 30<sup>th</sup> March, 2017 on the introduction of an excise duty on bottled Water, Juices, Soda and other Non-Alcoholic Beverages and Cosmetics be quashed;*



- (d) *KRA crafts and implement a meaningful programme of public participation and stakeholder engagement in the process of the tendering Tender Number KRA/HQS/DP-423/2014-2015 and or to ensure that the direct procurement meets the strict statutory requirements of Section 103 (2) (a) to (e) of the PPDA of 2005; and,*
- (e) *the award of Tender Number KRA/HQS/DP-423/2014-2015 for the EGMS awarded by the KRA to SICPA be quashed.*

KRA and SICPA appealed against this ruling at the Court of Appeal, faulting the High Court for misapplying itself to the applicable law for the award of the tender and wrongly finding that the Legal Notices relating to EGMS amounted to the imposition of new taxes. KRA and SICPA applied for a Stay of the Orders granted by the High Court arguing that their appeal had a high chance of success and that implementation of the order by the High Court would lead to a colossal loss of public funds to the government both in terms of the investment into EGMS and loss of Excise revenue.

On 11<sup>th</sup> May, 2018, the Court of Appeal granted a stay of the Orders of the High Court pending the hearing and determination of the appeal. Mr. Omtatah, thereafter, moved to the Supreme Court to appeal against the grant of the stay orders by the Court of Appeal. The application is also pending before the Supreme Court.

***Individuals/Entities met by Committee***

During consideration of the findings of the special audit, the Committee met with the following individuals/entities:

- (1) The Commissioner General, Kenya Revenue Authority;
- (2) The Chief Executive Officer of the Kenya Bureau of Standards;
- (3) The Chief Executive Officer of the Kenya Anti-Counterfeit Agency;
- (4) The Hon. Joshua Kutuny, Member of Parliament for Cherengani Constituency;
- (5) Management of SICPA Solutions SA in Switzerland;
- (6) The Solicitor General;
- (7) Management of the Kenya Association of Manufactures;
- (8) Management of the Public Procurement Regulatory Authority; and,
- (9) Office of the Auditor General.

### *Observations by the Committee*

The following is a summary of the observations made by the Committee based on evidence adduced by above witnesses who appeared before it:

#### *Procurement Process*

- (1) Pursuant to section 78 of the Public Procurement and Disposal of Assets Act 2005, an Expression of Interest (EoI) which as provided for in sub-section (1) is in form of a notice inviting persons to submit expressions of interest is a pre-qualification requirement and does not constitute a tender as envisaged in section 59(3) of the Public Procurement and Disposal of Assets Act 2005.
- (2) The Committee further observed that although the Deputy Commissioner for Procurement and Supplies Services wrote to the Evaluation Committee requesting a review of the expression of interest report to consider the impact of the digitization on KRA, there was no evidence tabled before the Committee to show that the action by the Deputy Commissioner interfered with the independence of Evaluation Committee as the Committee solely developed the evaluation criteria for the tender.
- (3) That although section 26(6) of the Public Procurement and Disposal Act provides that a procurement entity shall not commence any procurement procedure until it is satisfied that sufficient funds have been set aside in its budget to meet the obligations of the resulting contract, the Committee observed that the EGMS programme was to be a self-funding as the manufactures were charged Kshs. 1.00 per stamp. The question of whether section 26 (6) of the Public Procurement and Disposal of Assets Act was complied with by KRA may not therefore be sustained in light of the self-funding nature of the EGMS programme. Further, the evidence adduced by the Hon. Joshua Kutuny with respect to irregularities in the procurement process was not substantiated.
- (4) Based on the evidence adduced by KRA, the Committee observed that the need to review the pricing mechanism and consequently the contract may have been justified by the expansion of the scope of excise goods which the EGMS was to be used on and the need to ensure sustainability of the programme.

- (5) The Committee observed that KRA sought advice from the Solicitor-General and the Public Procurement Regulatory Authority in seeking to renegotiate with SICPA the contract terms.
- (6) Based on evidence submitted to the Committee, it was not possible for KRA to procure an alternative manufacturer to produce a stamp with design and security features compatible with tracking platform designed by SICPA without transfer of intellectual property rights to another supplier by SICPA.
- (7) Further, based on evidence adduced to the Committee, the Committee observed that an alternative or substitute for the service to be provided by SICPA to KRA would have led to loss of public funds as a new contract with a different supplier would have led to installation of new systems at a cost despite there being existing systems already installed by SICPA at KRA.
- (8) In view of paragraphs (7) and (8), the use of direct procurement by KRA met the requirements of section 74(2) of the Public Procurement and Disposal Act .
- (9) The Committee observed that the Office of the Attorney-General gave clearance for the execution of the contract between KRA and SICPA in terms of compliance with the Public Procurement and Disposal Act 2005 and Public Procurement and Disposal Regulations, 2006 in regard to the procurement process.
- (10) In light of paragraph (9) above, the procurement of the EGMS by KRA in the First, Second and Third contracts through SICPA complied and conformed with the Public Procurement and Disposal of Assets Act.

*Value for Money*

- (11) Based on evidence adduced before the Committee, the issue for value for money in the procurement process by KRA was taken into consideration based on the following grounds-

- (a) The EGMS system was geared towards eliminating the manual method of affixing excise and revenue stamps which led to loss of revenue collection due to rampant counterfeiting of stamps.
  - (b) The objective of the EGMS was also to widen the tax bracket which would have increased the amount of tax collected by KRA.
  - (c) As a result of the implementation of EGMS , there has been an increase in amounts of excise duty collected for example on certain consumer goods like wines and spirits where collection of excise duty had increased between 12% and 43%.
  - (d) The use of direct procurement by KRA in the third EGMS contract reduced the cost from Kshs. 1.7 which would have been the cost of the previous contract arrangement to Kshs. 1.417 as it allowed for renegotiation of the arrangement between KRA and SICPA.
  - (e) The EGMS can assist other government bodies such as the Kenya Bureau of Standards and the Anti-Counterfeit Agency in matters relating to fight against counterfeiting and ensuring quality and standards of consumer goods.
- (12) The Office of the Attorney-General through the Solicitor-General confirmed that having reviewed the contract documents submitted by KRA, the execution of the contract between KRA and SICPA ensured and promoted prudent use of tax payers' resources to achieve a cost effective procurement.
- (13) The evidence adduced by the Kenya Association of Manufacturers with regard to the cost of implementation of the EGMS was not substantiated.

***Submission of Legal Notice 110 of 2013***

- (14) The Committee observed that KRA had alluded to the fact that the National Treasury had submitted the Legal Notice 110 of 2013 to the National Assembly together with other budget documents.
- (15) The Committee also observed that the Excise Duty (Excisable Goods Management Systems) Regulations, 2017 which sought to repeal the Legal Notice 110 of 2013 were also submitted to the National Assembly and received in the Office of the Clerk of the National

Assembly *vide* a letter copied to the Chairperson of the Delegated Legislation Committee dated 11<sup>th</sup> April, 2017.

- (16) The Committee therefore observed that KRA did not violate the Statutory Instruments Act, 2013 in terms of submission of Legal Notices to the National Assembly as the National Treasury did indeed submit the respective Legal Notices to the National Assembly in accordance with the law.
- (17) The Committee further observed that pursuant to section 11(1) of the Statutory Instruments Act No. 23 of 2013, the Cabinet Secretary for National Treasury is required to ensure that within seven sitting days after the publication of a statutory instrument, a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before the respective House of Parliament. Further, section 11(3) of the Statutory Instruments Act No. 23 of 2013 provides that the responsible Clerk shall register every statutory instrument transmitted to the House for tabling.
- (18) The Committee noted that the House was however on recess and the Regulations were subsequently tabled in the House on 10<sup>th</sup> May, 2017 a date which was within the prescribed seven sitting days.
- (19) The Committee also observed that, following the tabling, the said Regulations stood referred to the Committee on Delegated Legislation for consideration pursuant to Standing Order 210 of the National Assembly Standing Orders and section 12 of the Statutory Instruments Act No. 23 of 2013, which provides that every statutory instrument issued, made or established after the commencement of the Act shall upon tabling before the respective House of Parliament stand referred to the Committee established for the purpose of reviewing and scrutinizing statutory instruments.
- (20) Further, pursuant to section 15(1) of the Statutory Instruments Act No. 23 of 2013, the Committee is required to make a report to the House containing only a resolution that the statutory instruments referred to the Committee be revoked and unless a specific provision exists in law requiring an express approval of the House on specified regulations (such as those under the Elections Act, 2011, Parliament does not engage in approving or amending

all or part of statutory instrument. Only an annulling resolution is contemplated where the relevant Committee moves the House to resolve as such, within the specified period.

- (21) Additionally, section 15(2) of the Statutory Instruments Act No. 23 of 2013 further provides that “where the Committee does not make the report referred to in subsection (1) within twenty-eight days after the date of referral of the statutory instrument to the Committee under section 12, or such other period as the House may, by resolution approve, the statutory instrument shall be deemed to have fully met the relevant considerations referred to in section 13 of the Act.
- (22) In view of the foregoing, the Committee observed that the Committee on Delegated Legislation did not however meet to deliberate on the Regulations and make a report to the House within twenty-eight days after the date of referral of the Regulations to the Committee as required by law. In this regard, the Committee observed that the Excise Duty (Excisable Goods Management Systems) Regulations, 2017 came into force on 7<sup>th</sup> June, 2017, which is twenty-eight (28) days after 10<sup>th</sup> May, 2017 in accordance with the provisions of sections 11, 12 and 15(2) of the of the Statutory Instruments Act No. 23 of 2013.

#### ***Public Participation***

- (23) The KRA demonstrated to the Committee that it undertook public participation by engaging affected sectors in the excise industry including manufacturers of tobacco, wines and spirits and held consultative meetings carried out in different dates as detailed in the Report. The Kenya Association of Manufacturers confirmed to the Committee of having engaged in consultations with KRA and National Treasury regarding the implication of EGMS on manner of doing business by manufacturers further evidencing that KRA engaged in public participation. There is however need for KRA to be conducting extensive public participation prior to implementing systems such as EGMS including consulting the consumers of excisable goods.

#### ***Inefficiencies due to Duplication of Work***

- (24) The Committee observed that, there is a likelihood of duplication of work between KRA, Kenya Bureau of Standards and the Anti-Counterfeit Agency due to the multiplicity of stamps and systems used by the three bodies in performance of their respective functions.

***Need for coordinated efforts in Procurement***

- (25) The Committee also observed that, it would be more prudent for the KRA, Kenya Bureau of Standards and the Anti-Counterfeit Agency, to have procured the EGMS services together noting the system is relied upon by the three bodies so as to ensure a coordinated approach in dealing with counterfeits which would in turn reduce loss of public funds occasioned by reduction in amount of taxes collected by KRA as a result of counterfeit goods.

***Pending cases***

- (26) The Committee observed that the High Court Case (*Okiya Omtatah Okiiti v. KRA, - Petition Number 532 of 2017*) which had declared the procurement process of the EGMS as being irregular and against the law was appealed by KRA and SICPA and stay orders against the decision of the High Court granted by the Court of Appeal. The appeal against the stay orders was subsequently filed by Okiya Omtatah at the Supreme Court and is still pending and hence the stay orders are still in effect. The Committee observed that the court processes were a threat to the implementation of the EGMS which would lead to loss of public funds.

***Background Information of SICPA***

- (27) The Committee observed that SICPA is a Swiss company and is a worldwide leader of security inks for currencies and sensitive documents, including identity documents for secure traceability of products subject to excise duties, such as alcohol and tobacco stamps. The Committee also observed that SICPA has presence in over 30 countries including Morocco, Tanzania and Brazil.
- (28) Despite the Committee writing to the Ministry of Foreign Affairs (Kenya) asking for any information regarding impropriety of SICPA in other countries, the Committee had not received any response at the time of compiling its report.

***Commencement of the Contracts***

- (29) Based on evidence adduced by the Solicitor-General, the Committee observed that the First Contract commenced on 18<sup>th</sup> April, 2013 and was for duration of 5 years. The contract was however terminated upon the execution of the Second Contract. The second Contract

commenced in February 2016 when the 'First Milestone Achievement Certificate' was issued and shall run for five years.

(30) KRA was advised by PPRA and Office of the Attorney-General that they could proceed with the procurement process.

#### *Committee's Recommendations*

Based on the observations, the Committee recommends that -

1. **Whereas Kenya Association of Manufacturers and Kenya Revenue Authority confirmed that there was public participation in the roll-out of the Excisable Goods Management System, the Kenya Revenue Authority, the Kenya Bureau of Standards and the Anti-Counterfeit Agency should conduct extensive and all-inclusive public participation prior to implementing systems such as EGMS.**
2. **Subject to paragraph (1) above, Parliament should legislate on a law on public participation as provided for in the Constitution.**
3. **The Kenya Revenue Authority should share their current Excisable Goods Management Systems with the Kenya Bureau of Standards and the Anti-Counterfeit Agency at no extra cost to the manufacturers.**
4. **Upon expiry of the existing contract, the Kenya Revenue Authority, the Kenya Bureau of Standards and the Anti-Counterfeit Agency should develop a multifunctional stamp for use by the three government entities, or any other that will need the system, which will ensure efficient monitoring and reduce wastage of public funds utilized in developing different stamps.**
5. **Parliament should amend the relevant laws to exempt "plain drinking water" from any taxation.**



## CHAPTER ONE

### 1.0 Introduction

#### 1.1 Mandate of the Committee

1. The Public Investments Committee is established under Standing Order (S.O.) 206. The Committee is responsible for the examination of the working of public investments on the basis of their audited reports and accounts. The Committee is also mandated with examining the reports and accounts of the public investments; examine the reports, if any, of the Auditor General on the public investments; and, examine, in the context of the autonomy and efficiency of the public investments, whether the affairs of the public investments, are being managed in accordance with sound financial or business principles and prudent commercial practices. In executing its mandate, the Committee is guided by: the National Assembly Standing Orders 2013; the Constitution of Kenya; the National Assembly (Powers and Privileges) Act (Cap. 6); the State Corporations Act (Cap. 446); Public Procurement and Disposal Act, 2005; Public Procurement and Disposal Regulations, 2006; Public Procurement and Assets Disposal Act, 2015; Public Finance Management Act, 2012; the Public Audit Act 2003, and, the Public Audit Act, 2015 among others.

#### 1.2 Committee Membership

2. The Committee on Public Investments as constituted by the House in December 2017 comprises of the following Members: -

Name of Member	Constituency	Party
Hon. Abdullswamad Sharrif Nassir, MP <b>Chairperson</b>	Mvita	ODM
Hon. Ahmed Abdisalan Ibrahim, MP <b>Vice-Chairperson</b>	Wajir North	ODM
Hon. (Dr.) Chrisantus Wamalwa Wakhungu C.B.S, MP	Kiminini	Ford Kenya
Hon. Raphael Bitta Sauti Wanjala, MP	Budalangi	ODM
Hon. Justus Kizito Mugali, MP	Shinyalu	ODM

Hon. Gladys Nyasuna Wanga, MP	Homa-Bay County	ODM
Hon. John Muchiri Nyaga, MP	Manyatta	JP
Hon. (Prof.) Mohamud Sheikh Mohammed, MP	Wajir South	JP
Hon. Babu Owino Paul Ongili, MP	Embakasi East	ODM
Hon. James Githua Kamau Wamacukuru, MP	Kabete	JP
Hon. Joash Nyamache Nyamoko, HSC, MP	North Mugirango	JP
Hon. Mary Wamaua Waithira Njoroge, MP	Maragwa	JP
Hon. Mohamed Hire Garane, MP	Lagdera	KANU
Hon. Omar Mohamed Maalim Hassan, MP	Mandera East	EFP
Hon. Paul Kahindi Katana, MP	Kaloleni	ODM
Hon. Purity Wangui Ngirici, MP	Kirinyaga County	JP
Hon. Rashid Kassim Amin, MP	Wajir East	WDM-K
Hon. Zachary Kwenya Thuku, MP	Kinangop	JP

3. PIC is currently facilitated by the following officers serving in its secretariat:-

Mr. Evans Oanda	- Senior Clerk Assistant
Ms. Marlene Ayiro	- Senior Legal Counsel
Mr. Thomas Ogwel	- Fiscal Analyst I
Mr. Alex Mutuku	- Senior Sergeant-at-Arms
Mr. Mohamed Boru	- Third Clerk Assistant
Ms. Sharon Rotino	- Research Officer III
Ms. Noelle Chelagat	- Media Relations Officer III
Ms. Winnie Atieno	- Audio Recording Officer

#### **1.4 Justification of the Inquiry**

4. Pursuant to its mandate, the Eleventh Parliament's Public Investments Committee commenced investigations into the alleged irregularities in the procurement process and implementation of the Kenya Revenue Authority (KRA) Tender No. KRA/HQS/DP-423/2014-2015 for Excisable Goods Management System (EGMS) for Printing, Supply and Delivery of Security Revenue Stamps Complete with Track and Trace System, and Integrated Production Accounting System awarded to SICPA Security Solutions, SA on 17<sup>th</sup> July, 2015. Several concerns on the procurement process were raised in the course of investigations. The previous PIC therefore requested the Auditor-General to conduct a Special Audit on the KRA tender for provision of Excise Goods Management System (EGMS). The Auditor-General conducted the requested Special Audit and flagged several issues termed as irregularities and culpabilities in a report submitted to the National Assembly on 30<sup>th</sup> June, 2017. It is on the basis of the aforementioned Special Audit Report that the Public Investment Committee of the 12<sup>th</sup> Parliament draws its mandate to examine the matter.
  
5. The ToRs of the Committee were based on the findings of the Auditor-General's Report on the following issues:
  - (a) Historical background of the EGMS;
  - (b) Review of procurement process in line with the provisions of the PPDA 2005 and Statutory Instrument Act 2013;
  - (c) Review of Legal Notice No. 110 of 18<sup>th</sup> June 2013 and Gazette Notice No. 12856 of 5<sup>th</sup> September 2013;
  - (d) Application of the Excise Goods Management System; and
  - (e) Value for Money.

#### **1.5 Committee Proceedings**

6. In its inquiry into the matter, the Committee held fourteen (14) sittings in which it examined evidence from the following witnesses:
  - (a) The Commissioner General, Kenya Revenue Authority ;

- (b) The Chief Executive Officer of the Kenya Bureau of Standards;
- (c) The Chief Executive Officer of the Kenya Anti-Counterfeit Agency;
- (d) The Hon. Joshua Kutuny, Member of Parliament for Cherangani;
- (e) Management of SCIPA Solutions SA in Switzerland ;
- (f) The Solicitor General;
- (g) Management of the Kenya Association of Manufactures (KAM);
- (h) Management of the Public Procurement Regulatory Authority (PPRA);
- (i) Office of the Auditor-General; and
- (j) Visit to SICPA Headquarters in Switzerland

## CHAPTER TWO

### 2.0 Background Information

#### 2.1 Introduction

7. Kenya is currently implementing Vision 2030 under the 2018/2022 Medium Term Expenditure Framework (MTEF). At the heart of the current MTEF is the implementation of the Big-4 Agenda that bears the pillars of manufacturing; universal health; housing and food security. To achieve these, there is need to develop a corroborative effort in resource mobilization; seal revenue leakages; and apply the available scarce resources in prudent manner. Several initiatives have been devised in the recent past geared towards achieving the above initiatives. Key among them is the introduction of revenue stamps and the EGMS by the KRA.

##### 2.1.1 Implementation of Revenue Stamps

8. The need to affix excise stamps on excisable goods came into operation in Kenya in 2003. Its implementation was rolled out in three phases:
- (a) Phase 1(2003): on tobacco (Excise stamps only);
  - (b) Phase 2 (2007): on tobacco, wines and spirits (excise stamps only); and,
  - (c) Phase 3 (2012): on tobacco, wines and spirits (excise stamps plus track and trace).
9. The objective of introduction of the excise stamps was not only to enhance revenue collection butalso to counter illicit trade including illicit imports; and to make it possible for traceability of excisable products within the supply chain.
10. According to the Kenya Revenue Authority (KRA), the benefits that were derived from the introduction of excise stamps since 2003 had significantly declined by 2009 due to rampant incidences of counterfeiting of the excise stamps leading to excise revenue losses occasioned by tax evasion. There was therefore an urgent need to develop a more reliable framework to address this.

## 2.1.2 Bodies Involved in the Fight against Illicit Trade and Import

11. In Kenya, there are a number of entities involved in combating illicit trade, counterfeiting and tax evasion. These include –

- (a) the Kenya Revenue Authority;
- (b) the Ministry of Health;
- (c) the Department of Weights and Measures;
- (d) the Kenya Copyright Board;
- (e) the Ministry of Agriculture;
- (f) the Anti-Counterfeit Agency; and,
- (g) the Kenya Bureau of Standards among others.

12. The complementarity function of government multi-agency teams in combating counterfeits is provided for under section 3 of the Anti-Counterfeit Act 2008.<sup>1</sup>

## 2.2 Global Standards on Features of a Security Stamp for Track and Trace System

13. Track and Trace systems are globally recommended as a means of countering illicit production and sales activities. According to the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) Report (2010), the technology available for track and trace system needs to have affixing unique, non-removable, secure, identifiable markings on a product such as a packet of cigarettes.<sup>2</sup> It should also be able to contribute to information-sharing among parties through the global information-sharing focal point of the proposed track-and-trace regime and also provide for modification to some extent with existing national and regional track-and-trace/control systems available and be compatible with other global track-and-trace regimes available.

14. In order to meet the objectives of the protocol on combating illicit trade for example in tobacco products, marking technologies used on such products need to fulfil the requirements indicated in the areas listed below-

- (a) **Human-readability**-markings must use characters that are comprehensible by people from a range of linguistic backgrounds;

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<sup>1</sup>Anti-Counterfeit Act 2008, s 5 on multiagency team in combating counterfeit

<sup>2</sup> FCTC/COP/INB-IT/4/INF.DOC./122 February 2010

- (b) **Uniqueness**- every individual tobacco product must have a globally unique identification;
- (c) **Security**-it should be impossible for external stakeholders to decrypt the complete marking without accessing a national, regional or global track-and-trace system;
- (d) **Integration**- all saleable units subject to tax by the authorities require a unique, serialized identity that can be exchanged by electronic means along the entire supply chain, starting from the point of manufacture;
- (e) **Compliance**-national or regional regulatory requirements must be respected;
- (f) **Size**-to be printable at pack level, markings must respect the size limitations of the products being marked;
- (g) **Ease of production**-markings need to be easily and quickly produced in order to meet the requirements of today's fast-moving international supply chains; and
- (h) **Cost-effectiveness**-as the parties negotiating the draft protocol are aiming for a standard solution, applicable globally; the resource limitations of developing countries need to be respected. In addition, costs to parties should not hinder the implementation of a global track-and-trace solution.

### 2.3 Establishment and Mandate of Kenya Revenue Authority

15. The Kenya Revenue Authority is established under the Kenya Revenue Authority Act (1995) as a government agency for collection and receipt of all revenue. In the execution of its mandate, the KRA enhances mobilization of government revenue while providing effective tax administration and sustainability in revenue collection<sup>3</sup>. The Board and the Management of KRA have since its inception spent time and resources setting up systems, procedures and the adoption of new strategies aimed at enhancing the operational efficiency of the Authority.

16. In order to realize its mandates, the Authority administers a number of statutes relating to revenue collection specified under Part I of Schedule 1 of the Kenya Revenue Authority Act 1995 such as the Income Tax Act, Customs and excise Act and the Value Added Tax Act, among others.

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<sup>3</sup>Kenya Revenue Authority Act 1995, sis 3 & 5 on establishment and functions of the authority

### 2.3.1 Excise Goods Management System (EGMS)

17. The EGMS was introduced by the Kenya Revenue Authority as a means of improving excise revenue collection. According to the KRA, its implementation started in 2012 initially with tobacco, wines and spirits. The system sought to address the challenges that the KRA was facing in revenue collection-

- (a) **Illicit trade** – evidence available at the time of introducing the EGMS indicated large scale counterfeiting of branded products and illicit production by underground manufacturers. For instance, 70% of the wine products in the market were illicit/counterfeit in 2009. Illicit trade undermines revenue collection through tax evasion besides undercutting genuine manufacturers.
- (b) **Production traceability** – even among genuine manufacturers, the ability to monitor actual production was lacking. Audits carried out among tobacco and alcohol producers revealed significant discrepancies between declared production and revenues received through the banking system.
- (c) **Illicit imports** – there was widespread parallel importation of branded products on which tax was not paid. The affixation of excise stamps discourages such practice which undermines genuine brand owners.

18. At factory level, the EGMS enables KRA to tally and tag all products with a unique electronic code that enables subsequent tracking of the product in the market place. At the retail level, tracking is done through field surveillance teams that use specialized code readers to authenticate the product<sup>4</sup>. Countries such as Albania, Turkey, Philippines, Morocco, Canada and USA (California and Massachusetts States) have implemented the system. Therefore, EGMS will essentially ensure the following:

- (a) enable enforcement by Public, retailers and distributors;
- (b) enhance the stamp as a tool for production and tax accounting;
- (c) ensure continuous tracking and tracing of the stamp along the supply chain;
- (d) facilitate field interdiction of illicit production;
- (e) ensure real time tracking of production;
- (f) eliminate potential for abuse and corruption among field staff.

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<sup>4</sup>KRA's letter to the Committee Ref: KRA/5/1002/5(378) dated 9<sup>th</sup> November 2018



## 2.4 Summary of the Procurement Process for the EGMS

### 2.4.1 Expression of Interest (EOI) for Provision of Security Printing and Digital Solutions

19. The procurement process was initiated on 19<sup>th</sup> August, 2010 through KRA's advertisement for the Expression of Interest for the provisions of security printing and digital Solution for revenue protection.

20. The Expression of Interest went through the following processes:

- (a) the expression of interest was opened on 22 September 2010;
- (b) twenty one (21) bidders demonstrated interest in the Expression;

No.	Name of Bidder
1.	Lantent Image Tech Ltd
2.	Garsu Pasaulis UAB
3.	De La Rue Currency & Security Printing Ltd
4.	Tall Security Print Ltd
5.	The copy Cat Ltd
6.	Giesecke Devrientfze
7.	Boertscgh International GMBH
8.	MFI Office Solutions Ltd
9.	Authentic Ltd
10.	Allami Nyamda
11.	Shanghai Fudan Techsan Techsan New Tech Ltd
12.	Madras Security Printers Private Ltd
13.	Bytwise Ltd
14.	3M South Africa
15.	Edaps Consoltium
16.	Joh Enschede
17.	American Bank Note Co
18.	Filtrona PLC
19.	Gapsons papers Ltd
20.	SICPA Security Sol SA
21.	Holostik India Ltd

- (c) nine bidders (9) were pre-qualified to submit their Request for Proposal;
- i. Edaps Consortium – Ukraine
  - ii. Holistik India Ltd. – India
  - iii. De La Rue Currency and Security Print – Kenya
  - iv. Madras Security Printers Ltd – India
  - v. Authentic Inc. – USA
  - vi. SICPA Security Solutions SA – Switzerland
  - vii. Filtirona PLC
  - viii. Tall Security Print Ltd
  - ix. American Ban Note Ltd
- (d) on 17<sup>th</sup> June 2011, the tender documents were issued to the nine (9) pre-qualified firms;
- (e) a pre-bidding briefing was held on 5<sup>th</sup> July, 2011 with three addenda subsequently being issued on 28 July, 2011, 25 August 2011 and 1 September 2011;
- (f) the tender closed on Friday 2 September, 2011 at noon and six (6) firms out of the nine (9) pre-qualified firms responded;
- (g) all the six responding firms qualified for vendor evaluation stage except De La Rue Currency & Security Print Ltd which failed to provide a sworn Anti-Corruption Affidavit;
- (h) two firms namely Authentic Ltd and SICPA Security Solutions SA passed the vendor evaluation and proceeded to Technical Evaluation;
- (i) technical Evaluation was completed on 22<sup>nd</sup> September, 2011 following which Authentic Ltd failed to make it to the cut-off score of 68% set for the Technical Evaluation;
- (j) SICPA Security SA therefore emerged as the only qualified bidder after technical evaluation;
- (k) the Financial Evaluation was carried out on 30 September, 2011 with one qualifying bid being opened;

- (l) the financial proposal presented by SICPA Security Solutions SA was for an annual project cost of Euros 6,696,900.00 and a total cost of Euros 20,090,700.00 for a period of three (3) years;
- (m) the overall cost quoted was in excess of the budget envisaged and since the project had not been funded, the procurement process was terminated on the grounds of affordability; and,
- (n) on 21<sup>st</sup> October, 2011 all, the six (6) bidders who had been issued with tender documents were informed of the termination of the procurement process.<sup>5</sup>

**2.4.2 Tender NO. KRA/HQS/ICB-037/2011–2012 Printing, Supply and Delivery of Security Revenue Stamps Complete with Track and Trace System, and Integrated Production Accounting System**

- 21. The requirements for the new Tender were reviewed and segregated to allow for a phased implementation approach. The rationale was that a phased implementation would counter challenges arising from inadequate funding.
- 22. The tender had three components namely: Stamps Printing; Track and Trace Software Platform; and, Production Line Accounting System.
- 23. The tender was re-advertised with the following distinct features:
  - (a) to acquire a security revenue stamp with Digital capability for process data capturing, audit and authentication;
  - (b) a production accounting system with a capability to remotely monitor activities at production line level;
  - (c) a track & trace system with ability to identify illicit fake stamps; and,
  - (d) a business intelligence capability to help in revenue forecasting and identification of problem areas.

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<sup>5</sup>KRA letters to 6 bidders ( De La Rue Currency 7 printing Security Print Ltd, Edaps Consortium, Holistic India Ltd, Madras Security Printers, & Sicpa Security Solutions Sa ) signed by Grace Murichu – Kariuki (Deputy Commissioner for procurement and Supplies Services ) informing them of termination of procurement proceedings forthwith due to inadequate funds.

24. The procurement was done through International Competitive Bidding with the Tender being advertised on 25<sup>th</sup> April, 2012.

25. Seven (7) firms responded by the closing date on 30<sup>th</sup> May, 2012 namely:-

- (a) Edaps Consortium – Ukraine
- (b) Holistik India Ltd. – India
- (c) Security Printing Press – India
- (d) De La Rue Currency and Security Print – Kenya
- (e) Madras Security Printers Ltd – India
- (f) Authentic Inc. – USA
- (g) SICPA Security Solutions SA – Switzerland

26. The tender evaluation process commenced on 30<sup>th</sup> May, 2012 with the following outcome:

- (a) Four (4) firms failed under Tender Responsiveness;
- (b) two (2) firms failed under the Technical Evaluation; and,
- (c) One firm, namely SICPA Security Solutions SA, qualified after both Technical and Financial Evaluation.

27. The award was therefore issued to SICPA Security Solutions SA on 14<sup>th</sup> December, 2012 with the following key aspects:

- (a) Provision of 3,556,200,000 Security Printed Revenue Stamps for a period of five (5) years at a total cost of Euros 20,341,464.00;
- (b) Provision of Track & Trace Software Solution for a period of five (5) years at a total cost of Euros 10,450,000.00;
- (c) Provision of Integrated Production Accounting System for a period of five (5) years at a total cost of Euros 11,680,000.00.

28. The project was self-financing with recoveries made through the sale of stamps at a unit cost of Kshs. 1.50 /= to cover all the three components.

**2.4.3 Tender NO. KRA/HQS/DP-423/2014-2015: Excisable Goods Management System (Printing, Supply and Delivery of Security Revenue Stamps Complete with Track and Trace System, and Integrated Production Accounting System)**

29. Phase three (3) rollout of the excise stamp covering tobacco, wines and spirits (excise stamps plus trace and track) commenced with a discussion on the pricing structure in 2015. The essence of this was to accommodate the large scope of product line arising from Legal Notice No. 110 of 18<sup>th</sup> June 2013<sup>6</sup> and also reduce the unit cost.

- (a) The cost escalation increased the cost per stamp beyond the expected levels (at a cost of Kshs. 1.87/= per stamp) and this implied that the money KRA collected from sales of EGMS stamp solutions to the manufacturers/ importers could not fully cover the bills invoiced from SICPA.
- (b) KRA opted for a direct procurement with SICPA which ended with termination of TENDER NO. KRA/HQS/ICB-037/2011–2012 and signing of TENDER NO. KRA/HQS/DP-423/2014-2015 to be executed from 30 October 2015. It commenced in earnest in February 2016 when the First Milestone Achievement Certificate was issued<sup>7</sup>.
- (c) The contract between KRA and SICPA Security Solutions SA for supply of the EGMS was at a contract sum of a minimum of Kshs. 15,909,293,482 and a maximum of KShs. 17,156,333,818 depending on the order made by KRA for a period of five years.
- (d) The new procurement was to achieve the following objectives:
  - (i) provide for project scope expansion to cover the other products not covered in the first two phases;
  - (ii) provide a unified charge to cover all three project components; and
  - (iii) transfer the project funding risks to the service provider (SCIPA) to allow KRA to pay a fixed charge irrespective of the number of production lines installed.

<sup>6</sup>Legal Notice No. 110 of 18<sup>th</sup> June 2013 by the CS, National Treasury expanding scope of the products to be covered under the EGMS except the motor vehicles either imported or assembled locally.

<sup>7</sup>Clause 3.33 of the Contract provides for start date which in the instance case begun when the First Milestone Certificate was issued on Bear in February 2016.

## CHAPTER THREE

### 3.0 Evidence Submitted

#### 3.1 Introduction

30. This Chapter contains evidence adduced by various agencies that appeared before the Committee in the course of the inquiry and the observations made by the Committee at each submission. In the course of its inquiry, the Committee received submissions from the Office of the Auditor-General; the Hon. Joshua Kutuny, Member of Parliament representing Chrengany Constituency; the Commissioner General of KRA; the management of SCIPA Solutions SA; the Managing Director of KEBS; the Chief Executive officer of the Anti-Counterfeit Agency; the Managing Director of the Kenya Association of Manufacturers; and, the Solicitor General.

#### 3.2 Special Audit by the Office of the Auditor-General

31. Dr. Sammy Kimunguyi, Deputy Director in the Office of the Auditor-General, herein referred as 'the auditor' appeared before the Committee to adduce evidence on the Special Audit on the procurement process and implementation of the Excise Goods Management System by Kenya Revenue Authority. He briefed the Committee on the contents of the Special Audit<sup>8</sup> on the procurement and implementation of the EGMS.

32. The auditor informed the Committee that the Special Audit was conducted pursuant to a request from the Clerk of the National Assembly through a letter referenced KNA/PIC/CORR/2016/172 dated 12<sup>th</sup> October, 2016.

33. The Special Audit was conducted on the following Terms of Reference (TORs):

- (a) Historical background of the EGMS;
- (b) Review of procurement process in line with Public Procurement and Disposal Act 2005, and Statutory Instrument Act 2013;
- (c) Review of Legal Notice No. 110 of 18<sup>th</sup> June 2013 and Gazette Notice 12856 of 5<sup>th</sup> September 2013; and

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<sup>8</sup>Special Audit Report on the Kenya Revenue Authority Tender No. KRA/HQRS/DP-423/2014-2015 for Excisable Goods Management System dated 30<sup>th</sup> June 2017.s

(d) Application of the System and Value for Money.

**(a) Historical background**

34. The Special Audit revealed that during the period 2003-2010, KRA relied on a manual method of affixing Excise and Revenue stamps on excisable goods that was only limited to tobacco, wines, spirits and beer. This method experienced rampant counterfeiting of stamps resulting in manufacturers under declaring volumes of their products leading to under collection of excise tax. To address these challenges, a delegation of KRA officials visited Brazilian Inland Authority to learn the benefits of implementing a comprehensive excise stamps management system. The team established that Brazil had put in place a system known as SCORPIOS that was used for integrated control and tracking of cigarettes production and that there was a possibility to customize the system to respond to specific challenges in the Kenyan Market.
35. The Office of the Auditor General was not availed any explanation/ justification on why KRA opted to visit only Brazil and not any other Country yet several other countries such as Albania, Turkey, Philippines, Morocco, Canada and USA (California and Massachusetts States) had implemented the system.

**(b) Procurement process**

36. The Procurement of the EGMS commenced in the year 2010 and was done at three levels as follows:
- (i) **The First Procurement** - *Tender No. KRA/HQS/060/2010-2011 (EGMS I)* - commenced in August 2010 when an Expression of Interest (EOI) was advertised by KRA. Tenders were subsequently issued in June 2011 where SICPA Security Solutions SA emerged as the only qualifying bidder.

The special audit established a case where the then KRA Deputy Commissioner for Procurement and Supplies Services interfered with the independence of the evaluation committee by issuing a memo to the Chairman, Evaluation Committee requesting a review of EOI evaluation report “to eliminate the aspect of digital

solutions” with an aim of increasing the number of potential applicants. This raised doubt on the objectivity of the evaluation report. The actions by the then Deputy Commissioner Procurement and Supplies Services to alter the EOI tender by eliminating the aspect of digital solutions amounted to change of substance of a tender contrary to section 59(3) of the Public Procurement and Asset Disposal Act (PPDA), 2005 that prohibits Procuring entities from attempting to have the substance of a tender changed after the deadline of submitting tenders.<sup>9</sup>

The tender was thereafter terminated in September, 2011 due to budgetary limitation an indication that KRA commenced the procurement process without confirming that sufficient funds were available contrary to section 26(6) of the PPDA, 2005<sup>10</sup> that prohibits procuring entities from commencing any procurement procedure until it is satisfied that sufficient funds have been aside in its budget to meet the obligations of the resulting contract.

- (ii) **The Second Procurement (EGMS II) tender number KRA/HQS/ICB-037/2011-2012** commenced in March 2012 through International Competitive Bidding. The tender process concluded in December 2012 with the award of the contract to SICPA Security Solution SA. KRA and SICPA Security Solution SA entered into contract for supply of Security Printed Revenue Stamps, Track and Trace Software Solution and Integrated Production Accounting System for a period of five (years) at a contract sum of Euros 42,471,464 (Kshs.4,808,134,887/-).

On 18<sup>th</sup> June 2013, the Cabinet Secretary in charge of the National Treasury issued Legal Notice No. 110 (L.N 110) that expanded the scope of items to be covered under EGMS to include all excisable goods except motor vehicles manufactured in or imported into Kenya.

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<sup>9</sup>PPDA 2005, s 59(3) of Public Procurement and Asset Disposal Act (PPDA), 2005 that prohibit change of substance of the tender after deadline of submitting tenders

<sup>10</sup>PPDA 2005, s 26 (6) prohibition of entities from commencing procurement without budget



On 15<sup>th</sup> May 2015, the KRA tender committee approved termination of the contract between KRA and SICPA Security Solution SA on the ground that the contract could not cover the extended scope of excisable goods provided for under L.N No 110 of 18<sup>th</sup> June 2013. Variation of the existing contract could have exceeded the twenty-five percent (25%) allowed in section 9 of the Public Procurement Amendment Regulations, 2013 (L.N 106).

- (iii) **Third Procurement** -As a result of termination of the contract, KRA initiated the third procurement (EGMS III) tender number KRA/HQS/DP/423/2014-2015 as a direct procurement involving negotiation with SICPA Security Solutions SA. These negotiations sought to expand the scope of the contract awarded on 14<sup>th</sup> December 2012 (EGMS) and signed on 18<sup>th</sup> April 2013 to include additional items introduced by the Cabinet Secretary of the National Treasury vide Legal Notice number 110 of 18 June 2013. L.N. 110 of 2013 required every package of the excisable goods except motor vehicle, manufactured in or imported into the country be affixed with an excise stamp.

The negotiations culminated into a contract between KRA and SICPA Security Solutions SA for supply of the EGMS at a contract sum of a minimum Kshs.15,909,293,482.00/= and a maximum of Kshs.17,156,333,818.00 /= (depending on number of orders made by KRA) for a period five (5) years.

The Special Tender committee cited existence of proprietary software that had been procured under the contract dated December 2012 as a rationale for engaging in direct negotiations with SICPA Security solutions SA. According to the committee, engaging an alternative supplier would have meant compelling manufacturers to install parallel software which would not be cost effective to the manufactures and eventually costly for consumers.<sup>11</sup>

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<sup>11</sup>Minutes of the Special Tender Committee held on 15<sup>th</sup> May 2015 in Times Towers in which the tender committee awarded SCIPA security Solutions SA the contract citing proprietary software and being the only company that can do the job going by previous two advertisements. They sought refuge in Section 74(2) of the Public Procurement and Disposal Act 2005 which allows a procuring entity to use direct procurement when convinced that there is no alternative.

**(c) Legality of Legal Notice No. 110 of 18<sup>th</sup> June, 2013 and Gazette No.12856 of 5<sup>th</sup> September, 2013**

37. On 18<sup>th</sup> June 2013, the Cabinet Secretary of the National Treasury issued a Legal Notice (L.N 110) that required all excisable goods except motor vehicles manufactured in or imported into Kenya be affixed with excise stamps. On 5<sup>th</sup> September 2013, the Commissioner-General of KRA issued Gazette Notice Number 12856 that prescribed the price of an excise stamp to be one shilling and fifty cents (Kshs.1.50/=).
38. There was however no evidence that both L.N No. 110 and G.N 12856 were submitted by the Cabinet Secretary, National Treasury and the Commissioner-General of KRA respectively to the National Assembly for scrutiny contrary to section 11(1) of the Statutory Instruments Act, 2013.

**(d) Financial implication of implementing EGMS on cost of production**

39. The Special Audit established that though manufacturers had incurred additional costs in installation of the EGMS, they had absorbed the costs within their profit margins instead of transferring the costs to the consumers for fear of losing on their respective market share. The implementation of the EGMS therefore impacted on the cost of excisable consumer goods. Among the manufactures/importers interviewed, none of them availed any evidence to indicate that the introduction of EGMS had resulted in double taxation of the manufactures/importers.

**(e) Value for money**

40. Value for Money auditing examines whether public organizations or programs have attained effectiveness, economy and efficiency in the management of resources at their disposal. The objective of establishing the EGMS was to widen the tax bracket thus increase tax collections that had been threatened by counterfeiting of stamps and manufacturers under-declaring volumes of their products. A review of data from KRA established that as a result of implementation of EGMS in the year 2010, together with relevant statutory instruments introduced in 2013, there was a general increase in amounts of excise duty collected by KRA on Cigarettes, Spirits and wines within the range of 12% and 43%.

41. In view of the foregoing, the special audit therefore concluded that whereas the acquisition of EGMS by KRA realized effectiveness, there was no evidence to prove that the process realized efficiency and economy as measures of value for money.

#### **Legality of issued Instruments**

42. There was no evidence that the provisions of Article 94(5&6) of the Constitution and the provisions of the Statutory Instruments Act of 2013 on National Assembly approval were adhered to while effecting the Legal Notices No. 110 of 18<sup>th</sup> June 2013 and No. 53 of 30<sup>th</sup> March 2017 respectively by the Cabinet Secretary for the National Treasury expanding the scope of the goods under the EGMS. Similar findings can be said of Gazette Notice No. 12856 of 5<sup>th</sup> September 2013 by the Commissioner General of KRA prescribing the prices of stamps under the EGMS. It has been held as such by the High court in petition 532 of 2017 though the Commissioner General has appealed against that decision<sup>12</sup>.

#### **Value for Money**

43. Whereas the acquisition of EGMS by KRA realized effectiveness, there is no proof that the process realized efficiency and economy as other important measures of value for money since the contract was single sourced hence lacked competitiveness.

44. There was no evidence that KRA undertook due diligence before commencing the procurement process for the EGMS.

### **3.2 Evidence by Hon. Joshua Kutuny, Member of Parliament for Cherengani Constituency**

45. On 26<sup>th</sup> July 2018 the Hon. Joshua Kutuny, MP appeared before the Committee to adduce evidence on the procurement process and implementation of the Excise Goods Management System by Kenya Revenue Authority. He briefed the Committee as follows:

- (a) The procurement and implementation of EGMS by the KRA had been partially handled by the PIC in the Eleventh Parliament which recommended for a Special Audit. The Auditor General subsequently audited the matter and reported to

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<sup>12</sup>*Okiya Omtatah Okiiti v Commissioner General of KRA & 2 others (2017)eKLR*

Parliament at a time when the term of the 11<sup>th</sup> Parliament had come to an end thus the matter was not discussed.

- (b) The tender for the installation of the EMGS by KRA was irregularly awarded to the SICPA Security Solutions SA on several fronts: KRA had no budget for the same leading to two cancellations after advertisements and award; it was single sourced; it was a duplication of the work done by KEBS; and it was too expensive.
- (c) The regulations authorizing taxation of Kshs. 1.50 /=per bottle were never discussed and approved by the National Assembly as per the requirements of the Statutory Instruments Act, 2013<sup>13</sup> rendering their existence nugatory and in breach of Article 94(5&6)<sup>14</sup> of the Constitution.
- (d) Implementation of the EGMS will see SICPA Security Solutions SA collect Kshs. 45 million daily; an amount that will reach Kshs.81 billion in 5 years against a contract sum of Kshs.17 billion. This means that a whopping balance of Ksh.64 billion will go to SCIPA Security Solutions SA.
- (e) In other countries such as Brazil and Morocco, such system is implemented at a cheaper rate.
- (f) SICPA's reputation worldwide is questionable as it was facing corruption charges in Brazil, and was rejected in Morocco and Tanzania. This means that KRA did not do due diligence before awarding the contract.
- (g) Implementation of the EGMS system was scheduled for a roll out on 1<sup>st</sup>August, 2018 despite the matter being active in the Supreme Court.
- (h) The roll-out of the EGMS will force manufacturers to change their designs to conform with it at huge costs that will eventually be forwarded to the currently overtaxed consumers. Furthermore, multinational companies such as Coca-Cola had been excluded from implementing the system thus indicating bias to the detriment of the local infant manufacturing companies.
- (i) KRA had continued to intimidate the manufactures who had a different opinion on the implementation of the System.

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<sup>13</sup>Statutory Instruments Act 2013 SS, 11, 12 & 13 on consideration of Regulations by Parliament

<sup>14</sup>Constitution of Kenya 2010, Article 94(5&6) on the Supremacy of Parliament in Legislation and how delegated legislations should be processed

- (j) The Committee should expedite enquiry into the matter. In the meantime, it was his prayer that the Committee requests the KRA to delay implementation of the system pending determination of all the issues surrounding it.

### 3.3 Evidence by the Kenya Revenue Authority

46. Mr. John Njiraini, the Commissioner General of the Kenya Revenue Authority (KRA), accompanied by a number of officers from KRA appeared before the Committee on 29<sup>th</sup> March 2018; 10<sup>th</sup> April 2018, 22<sup>nd</sup> May 2018 and 7<sup>th</sup> August 2018 to adduce evidence with regards to the procurement process and implementation of the Excise Goods Management System by Kenya Revenue Authority. He made the following presentation:

#### (a) Court cases:

47. KRA was taken to Court by Mr. Okiya Omutatah regarding the alleged irregular manner in which the authority procured and implemented the EGMS. The High Court had since rendered its Judgment in favour of the petitioner. Subsequently, KRA filed a Notice of Appeal at the appellate court on 16<sup>th</sup> March 2018 to challenge the decision of the High Court. KRA further applied for Stay of the judgment on 21<sup>st</sup> March 2018 pending the hearing and determination of an intended Appeal [in Nairobi Court of Appeal Civil Application No 78 of 2018]. The Application was decided in KRA's favour on 11<sup>th</sup> May, 2018 thus a stay pending the hearing and determination of the Appeal was granted<sup>15</sup>. The matter was to be heard on 13<sup>th</sup> August 2018. The Petitioner had since appealed at the Supreme Court the stay Orders granted to KRA at the Court of Appeal. The matter was to be mentioned on 20<sup>th</sup> August 2018.

#### (b) Alteration of the substance of the Expression of Interest for tender No KRA /HQS/060/2010-11 by authorizing elimination of the aspects of digital solutions during tender evaluations.

48. Section 59(3) of the PPDA 2005 which provides- "*The procuring entity shall not attempt to have the substance of a tender changed*" refers specifically to mandatory tender

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<sup>15</sup> Court of appeal ruling granting KRA Stay Orders on EGMS

specifications or qualifications and conditions, which have been stated in a bid document and cannot be altered after closure of the tender. The actual tender requirements were detailed in Tender No. KRA/HQS/060/2010-2011 and the same were not subject to any alteration during the evaluation process.

49. The Expression of Interest (EOI) was not a tender but a pre-qualification. The repealed Public Procurement and Disposal Act 2005 provided as follows for Expressions of Interest:

*Section 78*

- (1) The procuring entity shall prepare a notice inviting interested persons to submit expressions of interest*
- (2) The notice inviting expressions of interest shall set out the following-*
  - (a) The name and address of the procuring entity;*
  - (b) A brief description of the goods being procured and if applicable, the goods being procured;*
  - (c) The qualifications necessary to be invited to submit a proposal; and*
  - (d) An explanation of where and when the expressions of interest must be submitted.*
- (3) The procuring entity shall advertise the notice inviting expressions of interest in at least two daily newspapers of nationwide circulation.*

*Section 80*

*After the deadline for submitting expressions of interest the procuring entity shall examine each expression of interest to determine if the person submitting it is qualified to be invited to submit a proposal in accordance with the notice inviting expressions of interest.*

50. The qualifications requirements of the EOI were general as it was intended to provide latest information on the procurement item, which would inform the development of specifications as well as to identify qualified security printers. The criteria for evaluation were developed by the evaluation committee and the clarification given did not seek to alter the substance of the tender but to ensure that the needs of the user department were incorporated pursuant to the memo dated 28<sup>th</sup> March 2011.

51. In this particular instance the first evaluation of the Expression of Interest was presented to the Tender Committee on 21<sup>st</sup> January 2011 and the matter was deferred and the same was to be resubmitted after the user department had obtained consensus from top management and stakeholders on the proposed solution.

52. Further, the decision to reprioritize digital stamping in preference for paper stamping was because KRA was not ready for the introduction of digital stamping as there was need to understand the implication of digital stamping on KRA, manufacturers and consumers. The user department is part and parcel of the entire process from the beginning to the end and cannot be expected to be a silent observer awaiting the final outcome.
53. The Procurement Unit coordinates the functions of the various committees and provided professional advice as provided for in the Public Procurement Disposal Act 2005. The PPOA Guidelines of 2009 and 2012, further clarified this role and which states the following as part of the responsibilities of the Procurement Units;
- (a) Coordinate the evaluation of bids;
  - (b) Participate in or advise Evaluation Committee as and where appropriate;
  - (c) In conducting its functions, the Procurement Unit shall at all times liaise with the following:
    - (i) The end user who initiated the Procurement to ensure that the procurement meets its needs; and,
    - (ii) The procurement, Tender or Disposal Committee, to ensure that all the required approvals are obtained promptly.
54. The Public Procurement and Disposal Act and the regulations that gave rise to the same have clearly stated the requirements for evaluation of tender and proposals and the management of the same and this is distinct from the evaluation of expressions of interest. The legislation expected that there should be teamwork even as there is separation of roles so as to achieve the desired business outcome.

**(c) Failure to ensure that sufficient funds were available prior to initiating the First Procurement of EGMS Tender Number KRA/HQS/060/2010-2011**

55. The programme was self-funding as the manufacturers and importers were charged Kshs 1.00 per stamp. However, the only qualifying bid submitted by M/S SICPA was above the fee and therefore unsustainable. When dealing with specialized procurements it is also difficult to secure indicative prices outside a competitive bidding process as suppliers ensure that there are non-disclosure agreements signed with the procuring entities.

56. The Kenya Revenue Authority had initially provided a budget of KShs.240/= million for the procurement of the EGMS. This was based on earlier experience in the procurement of stamps. During the Expression of Interest participants were also asked to provide indicative costs. The response to this was that the cost would be within the price range for the stamps. In this regard the Authority had met the requirements of the Section 26(6) of the Public Procurement and Disposal Act 2005.

**(d) Justification for direct procurement**

57. The contract arising from Tender No. KRA/HQS/ ICB-37/2011-12 had been running for a period of one year when the need to review the pricing mechanism due to the proliferation of production lines arose. In addition to above, Legal Notice No. 110 of 18<sup>th</sup> June 2013 was introduced requiring that all excise goods with exception of motor vehicles be affixed with stamps. The scope of the project was therefore to expand beyond what had been earlier envisaged while the Kenya Revenue Authority was committed to the current service provider for a period up to 2018.

58. KRA petitioned National Treasury on several occasions to allow a higher stamp price<sup>16</sup>. The letter to the National Treasury among other issues, briefed the Cabinet Secretary on KRA's decision to renegotiate the contract in order to achieve financial sustainability. The renegotiation helped stabilize the situation by providing a fixed cost recovery based on each stamp sold, thereby assuring project sustainability. Following internal discussions, it was agreed that a new process be commenced to secure the following two key objectives:

- (a) Provide for project scope expansion to cover the other products not covered in the first two phases.
- (b) Provide a unified charge to cover all three project components. By achieving this, project funding risks would be transferred to the Service Provider as KRA would pay a fixed charge irrespective of the number of Production lines installed.

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<sup>16</sup>Letter from the Commissioner General of KRA to the CS for the National Treasury Ref KRA/5/1002/26 (25) and dated 6<sup>th</sup> February 2015 on pricing of excise stamps where KRA was proposing increase of cost from Kshs. 1.50 to Kshs. 2.0 per stamp.



59. After extensive internal deliberations including the seeking of legal and professional advice from both the State Law Office and PPOA, it was determined that the feasible approach to deliver the two objectives was through negotiation with the existing Service Provider, namely SICPA Security Solutions, SA. In view of this, a new procurement process was commenced.
60. The proposal by the Service Provider was analyzed extensively and the user department submitted a business case for the review of contract terms dated 31<sup>st</sup> October 2014.
61. The procurement department analyzed the business case and recommended for the appointment of a negotiation Committee for the review of the Contract for Printing, Supply, and Delivery of Security Revenue Stamps Complete with Track & Trace System and Integrated Production System. A Negotiation Committee was appointed and subsequently held meetings with SICPA Security Solutions SA between 7<sup>th</sup> January and 15<sup>th</sup> January 2015 based on the current contract and a proposal on a revised price model submitted by SICPA Security Solutions SA dated 15<sup>th</sup> January 2015.<sup>17</sup>
62. The Tender Committee first deliberated on this matter during its meeting on 4<sup>th</sup> February 2015 and approved the review of the contract so as to accommodate the requested changes.
63. The use of direct procurement as provided for under the Public Procurement and Disposal Act 2005 section 74(2) was justified as follows:
- (a) There was only one person who could supply the goods works or services being procured**
64. The Authority had already committed to pay M/S SICPA, Euros 22,130,000 for the system and had indeed made significant payments towards the same over a period of two years.
65. It was reported that the excise stamp is a security printed product whose design and security features are inbuilt and proprietary to its manufacturer. Considering the observations above, it was not possible to procure an alternative manufacturer to produce a stamp with design

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<sup>17</sup>Minutes in which KRA negotiation team met with SICPA between 7<sup>th</sup> and 15<sup>th</sup> January 2015.

and security features compatible with the tracking platform designed by SICPA. Solution SA. To achieve such an outcome would have required SICPA Solution SA to be compelled to share its intellectual property codified in the stamp design with competitors, a fact which is not consistent with law and business practice.

66. The outcomes of the various tenders confirmed that only SICPA solution SA possessed the type of solution needed to address KRA's requirements. This assertion is itself backed by international experience where on the global stage, SICPA Solution SA has been acknowledged as the pre-eminent provider of secure track and trace solutions that meet the needs of government and other regulators. The solution provided by SICPA was proprietary in nature and not available off the shelf but specifically designed to address KRA's needs.

**“There was no reasonable alternative or substitute for the goods works or services.”**

67. There was an existing contract for 3,556,200,000 stamps whose implementation already covered the major manufacturers and whose cost was being amortized over a period of 5 years. An alternative solution would have duplicated the existing services including the already installed tracking platform, thereby leading to wastage of public funds.

68. Besides, an alternative provider would have compelled some business enterprises to install parallel EGMS facilities thereby leading to unnecessary escalation of operating costs. For example, companies in the alcohol industry which manufacture beer and other alcoholic beverages would have been required to deal with two service providers, thereby unnecessarily escalating their costs. There was therefore need to address the rising costs attributed to increase of production lines within the existing manufacturers in addition to the extended scope estimated to require 12,876,633,889 stamps.

69. The Tender Committee during its meeting held on 15<sup>th</sup> May, 2015<sup>18</sup>, deliberated on the proposal for the termination of the existing contract and the award of a new Contract based on the negotiations and approved the following-

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<sup>18</sup>Supra, Note 11 on the Special Tender Committee meeting's justification of direct procurement

- (a) Termination of the existing contract with SICPA Security Solution SA;
- (b) Use of Direct Procurement Method;
- (c) Award of a Framework Contract to SICPA Security Solution SA at an estimated cost of Euros 158,213,898 (equivalent to KES.15,909,293,482.00)/= for a period of five years, commencing immediately on termination of the existing contract so as to accommodate an aggregated usage stamp fee of EUR 13.25 per 1'000with the following components:
  - (i) The Stamp (on paper or digital code on the product);
  - (ii) The Service for Track & Trace computerized system, including a total up to 250 handheld terminals for KRA officers (90 additional to the 160 already delivered) and 10'000 VA11 cards for authentication by manufacturers, distributors, retailers and importers (already delivered); and
  - (iii) The Integrated Production Accounting System fee, including a total of thirty three (33) revenue stamps activation equipment for importers (already delivered) but without limitation to the number of production line monitoring equipment).

70. The procurement was reported to the Procurement and Disposal & Information and Communication Technology Oversight Committee of the KRA Board on 12<sup>th</sup> and 18<sup>th</sup> June 2015<sup>19</sup>.

71. As well as to the main Board of Directors during its meeting held on 2<sup>nd</sup> July 2015,<sup>20</sup> consultations were carried out with the State Law Office as is required by Law [The Office of the Attorney General Act, Section 5(1)(c)] and a “no objection” was provided vide letter dated 1<sup>st</sup> July 2015<sup>21</sup>. The Use of Direct Procurement was reported to the Public Procurement Oversight Authority on 21<sup>st</sup> July 2015 as is required by Regulation 62(3) of the Public Procurement and Disposal Regulations 2006<sup>22</sup>.

<sup>19</sup>Minutes of 83<sup>rd</sup> Procurement & Disposal & Information & Communications Technology Oversight Committee in which the procurement was reported as it was valued more than Kshs. 10M.- Minute 4/PSS/83/2015-2

<sup>20</sup>Minutes of the 237<sup>th</sup> meeting of the Board of Directors of KRA held on 2<sup>nd</sup> July 2015 in which the matter of direct procurement of EGMS was reported.

<sup>21</sup>Letter from KRA to AG referenced KRA/5/BS12/8/C/78 dated 24<sup>th</sup> June 2015 and a response referenced AG/CONF/2/6/61 VOL.VIII (34) dated 1<sup>st</sup> July from the Solicitor General having no objection to the contract provided the from the legal point of view but KRA should adhere to the procurement law.

<sup>22</sup>Letter from KRA to the Director General of PPOA referenced KRA/5/PSS13/2/10 and dated 21<sup>st</sup> July 2015 reporting the direct procurement.

72. The Authority also noted that the Public Investment Committee had previously asked the PPOA for their professional opinion regarding the EGMS procurement and in their response dated 26th September, 2016, the PPOA in the concluding paragraph stated as follows-

*"In our view, engaging SICPA Security Solutions SA, for the extra scope of the assignment, was a reasonable option based on the fact that the bidder installed software for verification of stamps, which had proprietary features".*

**(e) Evidence of Value for Money**

73. At the time the authority did the Direct Procurement (DP), the cost of the previous arrangement had risen to KShs.1.70/=. Through the DP they were able to bring it down to KShs.1.417/=. Thus, the decision to renegotiate this arrangement was meant to ensure that the cost was brought down to within what was being collected through the serialized stamps.

74. In addition, there was a possibility of double paying for the software platform since it was propriety and a new supplier would not use the existing platform for the current supplier. There was also the likelihood that some manufacturers could have been compelled to implement parallel production line equipment which would have doubled their costs.

**(f) Limited Due Diligence**

75. It was reported to the Committee that Kenya and Brazil are members of *M/s Centro Interamericano de Administraciones Tributarias* (CIAT) (an Inter-American Centre for Tax Administrations). CIAT aims at improving tax administration through exchange of information, technical assistance and sharing of best practices. The organisation obligates members to provide technical assistance to other member organisations when called upon to do so. The visit to Brazil was therefore informed by the learning opportunities provided under CIAT.

76. In addition, Brazil being a developing country like Kenya, faces similar experiences and challenges in the administration of taxes with its neighbours. This consideration further made Brazil the best choice for a study on the elimination of illicit trade using technology.

77. Further, because the Kenya Revenue Authority was not quite conversant with the advancements in the industry, it opted to proceed with an Expression of Interest so that it could acquire more information on those have implemented similar systems elsewhere.

**(g) Inadequate Public Participation before procurement and implementation of EGMS**

78. It was KRA's evidence that it engaged all the affected sectors in the excise industry. Between 2012 and 2014, KRA engaged manufacturers of tobacco, wines and spirits through consultative meetings, leading to the successful rollout of the system. This is evidenced by EGMS Documentary featuring Kenya Association of Manufacturers (KAM), and several manufacturers.

79. In the last phase of the roll out to cover soft drinks, water, juices and cosmetics, KRA engaged and formed working groups with the industry players for consultations and collaboration for smooth implementation of the system. To this end, KRA engaged KAM, KEPISA, and the Alcoholic Beverage Association of Kenya (ABAK).

80. In the beginning, the consultative meetings were carried out on the following dates:

- Round 1: (15<sup>th</sup> -31<sup>st</sup> May 2013)
- Round 2: (29<sup>th</sup> July -16<sup>th</sup> August 2013)
- Round 3: (27<sup>th</sup> January 2014 – 4<sup>th</sup> February, 2014)
- Round 4: Technical working groups: (11<sup>th</sup> February- 17<sup>th</sup> May, 2016)

81. High level meetings between the Commissioner General, KRA and CEO, KAM on the 29<sup>th</sup> of February, 2016.

**(h) Failure to Submit Legal Notice No. 110 of 18<sup>th</sup> June 2013 and Gazette Notice No. 12856 of September 2013 for scrutiny by Parliament as provided in the Statutory Instrument Act of 2013**

82. In respect of the Legal Notices and Gazette Notices, the National Treasury indicated that the papers had been forwarded to Parliament together with the 2017/2018 budget documents.

### 3.4 Evidence by the Kenya Association of Manufacturers

83. Mr. Kimani Rugendo, the Chairperson, Kenya Association of Manufacturers (KAM) was accompanied by Mr. Muchai Kuniya (Vice Chairman, KAM), Mr. Job Wanjohi (Head of Policy), Mr. Ishmael Bett (CEO, Kenya Association of Suppliers), Ms. Victoria Kaigai (Government Affairs Manager, BAT) Mr. Salman Sucaib (Chief Finance Officer, L'Oreal), Mr. Bharat Shah (Kenafric), Ms. Grace Mbiu (L'Oreal), Mr. Hasmukh Shah (KAM), Mr. Anup Bid (KAM) and Ms. Miriam Bomett (KAM) appeared before the Committee on 8<sup>th</sup> August, 2018 to adduce evidence on the procurement process and implementation of the Excise Goods Management System by Kenya Revenue Authority. He submitted that:

#### *Manufacturers experiences in implementing the EGMS under the 2013 Regulations*

84. The cost of installing the EGMS was significantly high. Sectors such as alcoholic industry have spent more than 400 million to implement the System in terms of application and coding equipment, line adjustments and additional system networking.

85. The cost of excise stamps had continued to increase arbitrarily. Examples of this are on cigarette products which were discriminately increased from Kshs 1.50/= to Kshs. 2.80/=. This amounted to an increase of 87%, an unprecedented and unexpected cost to the business.

86. The cost of excise stamp has been disproportionately apportioned to different products with no justification. The cost of the stamp should remain the same and applied on all products excisable and stamped goods. An example is the cost of stamp varies between KES. 0.5 to 2.8 for different products.

87. The installation of the system had evidenced emerging costs related to retrofitting the production line to accommodate the new system. KRA is only providing the cost of the machine.

88. The system of stamp affixing in Kenya faces a myriad of challenges. A good example is with the standardization mark which has been in implementation for a long period. Recent reports indicate that the stamps have been counterfeited.

*Challenges faced by manufacturers in the implementation of (EGMS)*

*(a) Cost of the Stamp*

89. It was noted that the cost of the stamp for each category of goods was set out in the Excise Duty (Excisable Goods Management System) Regulations of 2017. The stamp was additional to the Excise Duty tax payable under the Excise Act. This therefore amounted to double taxation. The cost of the stamp stated in the Regulations consists of the cost of the ink and stamps. This proposed cost cannot justify the cost of stamp as manufacturers tend to print batch numbers and the cost of ink for coding or for stamps which is way too low as compared to the one proposed. Manufacturers should not pay for the system introduced. Table 1 below shows international Comparisons of stamp fees and clearly shows that Unit price is highest in Kenya.

**Table 1: International Comparisons of Stamp Fees**

In Local Currency Unit					at April 7 <sup>th</sup> USD/LCU			
Product	Kenya (KES)	Brazil (BRL)	Georgia (GEL)	Morocco (MAD)	Kenya (USD)	Brazil (USD)	Georgia (USD)	Morocco (USD)
Water	1.500	0.030	0.010	0.010	0.015	0.008	0.004	0.001
Sodas	1.500	0.030	0.012	0.030	0.015	0.008	0.005	0.003
Beer	1.500	0.030	na	0.200	0.015	0.008	na	0.021
Cigarettes	1.500	0.050	Na	0.500	0.015	0.014	na	0.052

Source: KAM

90. KAM estimates that the country has an installed bottling capacity in excess of 500,000 bottles an hour which translates to 12 million a day (360 million a month) \* 12 months=4.32 billion a year (assuming 100 % capacity utilisation). The estimated actual cost of a stamp is

about 7 cents which when multiplied with the production capacity cost is equivalent to **3.024 billion** whereas collecting revenue from the proposed stamp duty of 60 cent will equate to **Kshs. 25.9 billion**. There is cost disadvantage for manufacturers to a tune of **Kshs. 22.88 billion** hence the implementation is not revenue neutral.

**Table 2 - Breakdown of Estimated Costs of the Stamps:**

		<b>Bottles produced per year (billion)</b>	<b>Total (billion)</b>
<b>Estimated cost of a stamp</b>	7 cents	4.32	<b>3.02</b>
<b>Proposed cost of the stamp</b> (Proposed beverage cost of stamp)	60 cents	4.32	<b>25.90</b>
<b>Difference between the actual and estimated cost of a stamp</b>			<b>22.88</b>

91. The following were the anticipated effects of the cost of stamp duty:

- (a) costs related to EGMS will eventually be borne by the consumers to meet the cost of production and the additional costs;
- (b) Inflation adjustment assessed annually also increases the amount of excise tax. This increases inflationary pressure in the country. With the high inflationary cost of living, the common “*mwanaichi*” will be affected in this price sensitive economy;
- (c) the proposed costs will render manufacturers uncompetitive as this is an additional cost;
- (d) the sales volumes will be affected and will lead to quantum losses for the manufacturing companies; and,
- (e) large shares of excisable products are low margin products and sensitive to price increases.

***(b) Equipment installation and operational costs of the system***

92. Issues relating to additional investment of drying/blowers equipment/Capital outlays:

Manufacturers have to bear certain capital outlays related to the installation of the system.



Examples of this include, blowers to dry parts of products such as the bottle caps before they can be coded, new reject lines for each EGMS machine installed, server rooms, fibre optic cabling, software and hardware synchronization among others.

93. Sweating /steam/heat affect the printing/coding as the bottle cap area has to be completely dry. Water affects the coding so manufacturers have to ensure the surface is dry and use a blow dryer before coding. This necessitates the installation of a blower to dry the caps before they can be coded.
94. Policy issues on Overall Equipment Efficiency (OEE) guarantees: When installing and making adjustments to accommodate the EGMS system, some manufacturers require experts (OEMs) to be present during the installation on the lines. This is as per their machinery policy warranty and guarantees for their manufacturing equipment to avoid withdrawal of warranty offers. On average the industry estimated that the cost of getting the OEMs to be present would cost about 150,000 Euros per line which is beyond the cost of most manufacturers.
- (a) **Excise stamps on cosmetics and beauty products (Products packaged in small packs/Odd shaped product packages):** Certain cosmetics products are very small in shape and size and it was physically and practically impossible to paste manual stamps or digital stamps on them. Some cosmetics products also have odd shapes that restrict fixation of the stamps.
  - (b) **Issues relating to printing, size of caps, embossed caps, sports caps and the ink colours affecting the dark coloured caps and tetra packs: it was pointed out that** printing on sports caps would not be practical and the ink was not fit for human consumption when the cap touches the opening part of the packaging. There is no flexibility on the printer and the diameter of the print especially for smaller diameter caps with tamper proof seals such as the mineral water bottles. Different manufacturers have unique challenges as far as embossing, design and colour of the caps and tetra packs and therefore this problem required a complete overhaul of product design which in many cases was not possible due to the inherent design of the packaging of the product.

- (c) **Issues related to the location of the print:** The EGMS system is not designed to alter the location of the printing to the side of the bottle but instead it is designed to print on top of the caps or tetra packs as manufacturers have different machines where some print on the side. With the KEBS standardization mark affixed, the stamp may overlap with the new stamps.
- (d) **Issues related to Intellectual Property Rights (IPR):** Printing on trademarks and embossing is impossible on the current EGMS equipment and also making any changes on the goods. An example on this is bottle caps.
- (e) **Treatment of goods for exports on demand:** Many manufacturers do not have a separate assembly line for production of export goods only. Goods made for home consumption require to be affixed with stamps while goods for exports do not. The EGMS machine has an export mode which allows switching on when goods for export are being produced. Certain exceptions apply which make it difficult to use this mode. There are instances where goods are produced and the order is cancelled. This situation would present challenges for manufacturers in relation to exports if they need to be returned back to the market. This implies that goods originally produced for export will need to be reworked into the system and coded for local consumption which is not possible since, the EGMS equipment is integrated in the production line.
- (f) **Issues related to rework on products that are non-compliant to the Quality Assurance (QA) policy:** it was noted that there were instances where manufacturers have problems with the labels such as bad expiry dates that need to be reworked and brought back to the assembly line. However, with the new system, manufacturers are concerned with the effect of the coding of reworks after goods are produced and how will the line deal with in-house and market rejects.
- (g) **Issues related to small floor spaces and physical hindrances to expansion of the floor space in rented warehouses:** Some manufacturers do not have the space to accommodate the EGMS equipment as it is not physically possible for them to remove their existing machines. The space and the physical layout of most factories is a constraint.

- (h) **Duplicity of inter-agency marks:** The system was going to add to the country's multiplicity of marks affixed on products. This is as opposed to moving towards the global goals of having a single application platform. The single system will also assist in dealing with counterfeits in the market and contra banded products. In Kenya, there are now a number of marks and codes that have to be affixed on a product. They include, Excise duty, KEBS standardization mark, Bar Codes, Product information, Responsible waste disposal and Product certifications.

### **3.4.3 Consultations with relevant Government Agencies**

95. In its meetings with KRA and the National Treasury, KAM had proposed the following:

- (a) **Cost:** The cost of the EGMS to be covered by the excise tax payable so that the system costs do not burden manufacturers or passed on to consumers.
- (b) **Exports:** KRA to address exports challenges arising from exports of goods. The agreement was for further consultations to be held.
- (c) **Scheduled individual company visits:** Due to the unique challenges of each company, site visits be conducted to customise solutions and guidelines.
- (d) **Implementation date of EGMS:** The date was to be jointly agreed upon by KAM and KRA.

### **3.4.4 Way forward**

96. De-gazettement and suspension of Legal Notice No. 53 of 2017 to allow for further and productive consultations.

97. Wider public stakeholder engagements: The Cabinet Secretary of the National Treasury and the Kenya Revenue Authority was to undertake extensive and comprehensive consultations with all affected stakeholders. The results of the consultations were to inform the decision of the Committee dealing with the impugned regulations.

98. Cost of the system and stamp: The system should not impose any financial burden to manufacturers and increase costs. This is necessary to ensure the sector remains competitive both regionally and globally. In addition, the Sector is already paying high excise tax that is

subject to increases regular and inflationary adjustments. In the alternative, for any extra cost incurred by the manufacturer arising from the implementation of the system, the cost could be used to offset against the payable excise taxes.

99. A verification audit before implementation of the system: Parliament and relevant government agencies who include, National Treasury and Kenya Revenue Authority should conduct a verification audit on the status of implementation and concerns raised by stakeholders. Authority attests to the fact that there are concerns that are yet to be resolved in the country.

### **3.5 Evidence by the Kenya Bureau Of Standards**

100. On 9<sup>th</sup> October 2019, Mr. Andrew Maiyo, the Ag. Director of Quality Inspection at the Kenya Bureau of Standards appeared before the Committee to adduce evidence on the procurement and implementation of the Excise Goods Management System.
101. Mr. Maiyo informed the Committee that Kenya Bureau of Standards (KEBS) is a government agency established on 12<sup>th</sup> July 1974 under the Standards Act, Cap 496 of the Laws of Kenya. Its mandate is to promote standardization in industry and commerce; and control, in accordance with the provisions of the Standards Act, the use of standardization marks and distinctive marks among other functions.

#### **KEBS Stamps/Marks**

102. The Ag. director submitted the following regarding KEBS' work on standardization marks:
- (a) Section 10 of the Standards Act (1974) requires commodities covered under an approved standard to have a standardization mark.
  - (b) KEBS operates a product certification scheme to certify that a certain product has passed performance and quality assurance tests and meets qualification criteria stipulated in contracts, regulations or specifications.
  - (c) The agency has the following categories of marks: the Standardization Mark (S-Mark) for locally manufactured goods; the Diamond Mark (D-Mark) as a mark of

excellence in product manufacturing and the Import Standardization Mark (ISM) for imported products that have been inspected. There is also a Fortification Mark of Quality applied to dry maize and wheat flour products fortified with additional minerals.

- (d) Of these, the Import Standardization Mark is affixed in the form of a paper stamp. The ISM was introduced in accordance with Legal Notice No. 78 of 2005 which provides for inspection and certification of imported products either in the country of supply or a point of entry in Kenya.
- (e) The Kenya Bureau of Standards does not charge for affixing standardization marks on products except for the Import Standardization Mark. KEBS however does charge fees relating to the certification scheme which they highly subsidize as product testing is an expensive exercise.
- (f) The cost for affixing stamps/marks by KEBS is itemized as follows:

SL	STANDARDIZATION MARK/STAMP	CHARGES
1.	Standardization Mark (S-Mark)	NIL
2.	Diamond Mark of Quality	NIL
3.	Fortification Mark of Quality	NIL
4.	Import Standardization Mark (ISM)	KES 0.49 with KEBS royalty of 7%
5.	Import Standardization Mark (ISM) as currently administered	

#### **KEBS Tenders Involving SICPA Security Solutions SA**

- 103. SICPA Security Solutions SA participated in two tenders for the Import Standardization Mark (ISM) i.e. Tender No. *KEBS/TO72/2014-2015* in 2015 and Tender No. *KEBS/TO41/2017-2018* in March 2018. In the case of the first tender, SICPA came 2<sup>nd</sup> after Madras Security Printers.
- 104. SICPA's bid failed at the technical evaluation stage as it was deemed to have failed to meet the minimum mark that was specified in the Evaluation Criteria of the Tender Document. Additionally, the NASPO certification used by SICPA Security Solutions SA

was not equivalent to the specified ISO 14298 certification set out in the tender document.

105. Aggrieved for not getting the 2015 contract, SICPA applied to the Public Procurement Administrative Review Board (PPARB) for a review of the evaluation process.
106. The PPARB granted orders for the review of the tender. KEBS got confirmation from the International Organization for Standardization (ISO) that SICPA's NASPO certification was not equivalent to ISO 14298. The results of the re-evaluation indicated that Madras had a better score than that of SICPA and KEBS proceeded to award the tender to the former.
107. SICPA proceeded on 7<sup>th</sup> May, 2015 to PPARB to appeal the decision of KEBS to award the tender again to Madras Security Printers in Review No. PPOA/ARB/7/24/2015. PPARB did not grant any new order to KEBS.

**Tender No. KEBS/T041/2017-2018**

108. SICPA participated in the above tender which was opened on 18<sup>th</sup> May, 2018.
109. The evaluation of the tender was carried out and two companies – Manipal Technologies Limited and Madras Security Printers Private Limited – qualified for the technical evaluation. SICPA Security Solutions SA did not qualify.
110. SICPA provided copies of ISO 9001, ISO 14001, ISO 27001 and OHSAS 18001 certifications for SICPA SA site in Switzerland while ISO 14298 certification from NASPO was for a site in Illinois, USA contrary to the tender requirement which required all certifications to be from one plant.
111. SICPA Security Solution SA did not provide approved audited accounts for the last five years but instead provided a report of factual findings of agreed upon procedures to the Management done by KPMG. In that report, KPMG stated that the procedure did not constitute either an audit or a review made in accordance with Swiss Auditing Standards

and therefore, they did not express any assurance on the selected financial data in CHF as of and for the years ended 31<sup>st</sup> December 2012, 2013, 2014, 2015 and 2016.

112. The tender was cancelled before award due to many complaints received from bidders.

### **3.6 Evidence by the Anti-Counterfeit Agency**

113. On 19<sup>th</sup> September 2018, Mr. Elema Halake, Chief Executive Officer of Kenya Anti Counterfeit Agency accompanied by J.O. Adera (DD, E&L); and Elijah Ruttoh (Manager) appeared before the Committee to adduce evidence on the mandate of the ACA vis a vis that of KRA in combating counterfeits. He informed the Committee as follows:

#### *Mandate of the Anti-Counterfeit Agency*

114. The Anti-Counterfeit Agency is established under Section 3 of the Anti-Counterfeit Act, 2008.<sup>23</sup> The mandate of the Agency springs from both the Constitution and the Act and it enlighten and inform the public on matters relating to counterfeiting. The Agency

- (a) combat counterfeiting trade and other dealings in counterfeit goods in Kenya in accordance with the Act;
- (b) Devise and promote training programmes on combating counterfeiting;
- (c) Co-ordinate with national, regional or international organizations involved in combating counterfeiting;
- (d) Carry out any other functions prescribed for it under any of the provisions of the Act or under any other written law;
- (e) Perform another duty that may directly or indirectly contribute to the attainment of the foregoing.

115. The Agency essentially exists to ensure that there is no abuse of the intellectual property rights of any person that is protectable under the applicable laws or instruments in Kenya. The statutory mandate of the Agency is set out under Section 5 of the Act to-

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<sup>23</sup> Anti-Counterfeit Act, 2008 s 3 on establishment of the Agency

116. The mandate of the Agency in addition to the aforesaid provision also appears clearly from the preamble to the Act which is to “prohibit trade in counterfeit goods”. The Agency started operations in June 2010 and has since then been guided by the provisions of the Act and the Regulations made thereunder to enforce all legitimate measures to ensure that there are no trade or any other dealings in counterfeit goods in the country.

*Whether the mandate is exclusive to Anti-Counterfeit Agency*

117. The statutory mandate of the Agency in combating counterfeiting is not exclusive and is shared with other government agencies and institutions. The statutory underpinning for this shared responsibility is drawn from Section (3) of the Act which provides as follows:
- “(3) In addition to inspectors appointed under subsection (1), any member of the Board, police officer, authorized customs officer, trade development officer, industrial development officer, trade mark and patent examiner, seed and plant inspector, public health inspector, and inspectors appointed under the Standards Act, the Weights and Measures Act, the Copyright Act, the Food, Drugs and Chemical Substances Act, the Pharmacy and Poisons Act and the Pest Control Products Act are hereby designated as inspectors for purposes of this Act.”
118. The Act has therefore designated other government officers as inspectors for purposes of enforcing the provisions of the Act.
119. The Agency stated that it worked closely with the other government institutions in the fight against counterfeiting and any other dealings in counterfeit goods. Here, the Agency is essentially the lead government institution in the fight against counterfeiting. The collaborative efforts between the Agency and the partner institutions are continuous and have been yielding positive results.

*Excise Duty (Excisable Goods Management System) Regulations, 2017*

120. On the provisions of the Excise Duty (Excisable Goods Management System) Regulations, 2017 and especially Regulations 30(1) (d) & 32(d)(i), the Agency observed that:
- (a) The Regulations have not defined what constitutes the word “counterfeit” in the definition part.
  - (b) The provisions in the Regulations do not relate to “**counterfeiting**” as defined at Section 2 of the Anti-Counterfeit Act. The Regulations therefore do not prohibit



trade in counterfeit goods within the meaning of the provisions of the Anti-Counterfeit Act.

- (c) A reading of Regulation 4 is clear that what is meant to be prohibited or deterred is the “forgery” of the excise duty stamp.
  - (d) Similarly, at Regulation 30(1) (g) it is clear that what is envisaged is the “forgery” of the excise duty stamp.
  - (e) The same goes for Regulation 32(c).
121. On the other hand, the Anti-Counterfeit Act prohibited the counterfeiting of goods and was ready and willing to engage with Kenya Revenue Authority to explore means and ways of using the Regulations to fight counterfeit goods within the meaning of the provisions of the Anti-Counterfeit Act.
122. From the regulations, the purpose of Excise Goods Management System is to fight “counterfeiting” of excise stamps and to raise revenue. From the Intellectual Property point of view, this is not counterfeiting but forging of excise stamps. At the core of the statutory definition of “counterfeiting” is abuse of intellectual property rights that include, inter alia, trademarks, patents and industrial designs. Therefore, the Excise Duty (Excisable Goods Management System) Regulations, 2017 were not designed to deal with prohibiting “counterfeit goods” although it may serve the same as a collateral purpose. As it is, it is possible that genuine excise stamps can be affixed to counterfeit goods within the meaning of the Anti-Counterfeit Act. It is also possible that counterfeit excise stamps can also be affixed to counterfeit goods.

### 3.7 Evidence from a Fact-Finding Visit to Switzerland

123. The Committee undertook a fact-finding mission to Prilly, Lausanne, Switzerland (Headquarters of SICPA Solutions SA) between 27<sup>th</sup> to 28<sup>th</sup> September 2018. The delegation comprised of the following:
- (1) Hon. Abdullswamad Sheriff Nassir, MP – *Chair/Leader of the Delegation*
  - (2) Hon. Paul Kahindi Katana, MP
  - (3) Hon. John Muchiri Nyaga, MP
  - (4) Hon. Ahmed Kolosh Mohamed, MP

- (5) Hon. James Githua Kamau Wamacukuru, MP
- (6) Hon. Nicholas Scott Tindi Mwale, MP
- (7) Mr. Fredrick Oluoch Odhiambo, *Office of the Auditor General*
- (8) Ms. Mugure Gituto, Legal Counsel, *Delegation Secretary*

124. While in Switzerland, the Committee interacted with the following officials from SICPA SA AND KRA:

- (1) Mr. John Katiku- Advocate for SICPA SA and SICPA Kenya Limited
- (2) Mr. Eric Corbier - Chief Commercial Officer
- (3) Mr. Christophe Renard -Marketing Services Director
- (4) Mr. Ben Sapin - SICPA Regional Counsel
- (5) Mr. Mathew
- (6) Mr. Brian Ligale - Chairperson SICPA Kenya Board
- (7) Mr. Christopher York - Managing Director SICPA Kenya
- (8) Mr. Caxton Masudi Ngeywo -Director, Kenya Revenue Authority

125. While in Switzerland, the Committee gathered the following:

### ***3.7.1 Overview of SICPA***

126. SICPA Security Solutions SA is a private family business established in Prilly in 1927. It has offices in 39 countries and sells its services and ink to more than 180 countries globally. In 1948, SICPA developed security ink for bank notes and through a process of innovating invented non-tamperable ink and shifting ink. SICPA also builds security solutions through its various innovations with more than 50 skills. It protects its inventions and innovations through patents.

127. SICPA developed the EGMS system with unique codes (serialization) that may be traced to their origin; solutions for border controls; cargo tracking; securing the supply chain of products, providing services to specific industries that need specific products protected

like watches, jewellery or special metals by putting in a security element on these products; fuel marking to guarantee fuel security among others. They have also developed solutions using smart phones for customers to check whether the products they purchase are genuine. SICPA SA works on business intelligence through collection/accumulation of data at production sites and imports and help the government analyze the data, detect trends and monitor the work of a customs officer.

128. Before a client engages SICPA, they are given a list of the clients obtaining similar services from SICPA and are advised to engage with them and interrogate the quality of the products and services they receive from SICPA. The scope of product however varies from one country to another as this depends on their specific needs and services.
129. SICPA systems are fully compliant with the requirements of the World Health Organisation (WHO), which proposed an aggregation of all the processes that link the production of goods with the declarations issued to the authorities and therefore minimizes fraud. The system helps government to respond to sophisticated threats with technologies.
130. SICPA reported that many of the threats they deal with come from industry players likely to be monitored or exposed by the security solutions and as a result, they employ numerous tactics to interfere with the deployment of these SICPA solutions.

#### ***Security Ink Solutions for Banknotes and Value Documents***

131. The company provides security inks that protect banknotes, security documents and value documents from the threats of counterfeiting and fraud. They range from inks developed for specific printing processes to solutions adapted for varnishing and theft deterrence systems.

#### ***Security Solutions for Governments***

132. Product authentication and tax reconciliation systems which integrate ink-based covert features and sophisticated traceability technologies. It also deals with production-monitoring systems that ensure the traceability of products and secure the collection of excise tax and V.A.T.

*Product and Brand Protection Solutions*

133. Provides integrated and multi-layered authentication, anti-tampering, identification and traceability with the aim of ensuring product and supply chain integrity, for healthcare, food and beverage, fast moving consumer goods, luxury goods and spare parts.

**3.7.2 Allegations against SICPA Security Solution SA**

134. SICPA Security Solution SA was made aware of allegations sent by email to the Clerk of the National Assembly and copied to numerous persons and institutions complaining about the impropriety between a KRA official and officials from SICPA Security Solution SA. In response to the allegations, SICPA Security Solution SA observed that Chess Enterprises Ltd whose Director had been mentioned is a company contracted by SICPA Security SA to provide local advisory services to assist them have local knowledge that is relevant when providing services to its client.
135. Mr. Christopher Renard, also mentioned in the letter confirmed to the Committee being in Berlin, Germany at about the same time as Mr. Caxton Masudi but that the two were participants in an open Tax Stamp Forum organized by the association of tax stamps forum. This forum was held in February 2017. During this forum, SICPA had a booth; they sponsored the conference and made presentations at the conference. He emphasized that the meeting with Mr. Masudi was not for any special purpose but was a meeting of tax administrators. Mr. Caxton Masudi and Ms. Muthambu, who is the head of the EGMS secretariat, represented the Kenyan delegation.
136. It was further stated that Mr. Michelle Castegnaro who worked with SICPA as the head of the East Africa Region was also attending the forum but the meeting was advised that he no longer worked with the company. Similarly, Mr. Maurice Amon and Mr. Philippe Amon also mentioned in the email as chairperson and co-chairperson of SICPA respectively were identified as shareholders. In this regard, SICPA undertook to provide the last known contacts of Mr. Michelle Castegnaro to the Committee as well as the list of participants from SICPA at the Tax Forum held in Berlin.

137. It was put to SICPA Security Solution SA that one of the allegations against them is that their contracts are constantly renewed because of their ability to compromise government officials especially in Brazil. SICPA however responded that such allegations are fake and completely untrue. They observed that the contracts are renewed due to the efficiency of the solutions that they offer especially where governments have increased revenue and that bribery is not only a crime but is in total contravention of SICPA's company policy.
138. As a general response to the repeated allegations of impropriety against them, SICPA cited dissatisfaction by the industry players and International competition as some of the factors that lead to accusations and allegations. Notwithstanding the allegations, SICPA has neither been involved nor convicted anywhere globally. They indicated that even in Brazil, whose political situation has been challenging the tract and trace solutions (Scopi contract) has been renewed for 10 years.

### **3.7.3 SICPA's Chronological Explanation of the Contractual Relations with KRA**

139. The relationship between KRA and SICPA commenced when they made a response to the request for an expression of interest. In 2011, SICPA responded to an international tender and submitted documents for technical and financial evaluation. In October 2011, the KRA terminated the tender due to lack of funds and this was communicated through the KRA website. A new tender for the same service was launched in March 2012 and SICPA submitted the bid and won the tender in December 2012. The two institutions engaged in negotiations from December 2012 to April 2013, and after the contract was signed, SICPA SA immediately incorporated and launched the SICPA Company in Kenya to offer technical support. SICPA commenced provision of stamps for tobacco, wines and spirits.
140. In October 2013, SICPA got a request from KRA to review the cost of the stamp/pricing and segregate within the cost of the solution. The format of the pricing was based on the price of the stamp, the information technology and a price per equipment to monitor the products. Further, KRA extended the scope and range of products necessitating the need to adjust the prices to include beer, soft drinks, juices, mineral water and cosmetics. There was an appendix, which was a first for SICPA that required the price to be segregated

costs in three different phases and it included the cost of the stamp, the central data management system and the price per equipment to monitor the prices. There were more production lines proposed by KRA and this necessitated the negotiation. The model used by KRA was that vendors would order and pay KRA per stamp delivered. Where the volume of stamps ordered by KRA was low, the revenue would be insufficient to cover the cost and KRA realized that the higher number of line, the lower the cost and there was an agreement to increase the number of lines through an incremental model pricing. The negotiation was intended to create a solution that was fair to the consumer. The variable cost was combined to a fixed cost per stamp and that takes into consideration the following elements:

- (a) category of the product or product scope;
- (b) volumes of the products to be implemented;
- (c) the technical solution required by the government for example provision of inspection devises, consumer engagement or other range of solutions;
- (d) the complexity of the industry, whether it is a monopoly or not;
- (e) the expansiveness of the industry; and
- (f) Commercial negotiation by the parties.

141. The extension and repricing model was agreed upon, in July 2015 the contract was awarded and the agreement signed on 30<sup>th</sup> October 2015.

142. Further, the Committee heard that:

- (a) SICPA commenced its investments in Kenya in 2010 when responding to the EOI.
- (b) The Commercial contract was signed in April 2013 and thereafter SICPA undertook investments in the installation of the required hardware after they had won the tender.
- (c) SICPA was aware that they faced fierce competition from five other international bidders in the first tender process, but they did not want to name any companies.

- (d) No competitors to the knowledge of SICPA were involved in the final tendering process in 2015. SICPA considered this as not a new tendering process but an extension of the existing contract with KRA.
- (e) SICPA engages consultants and advisers in many countries based on a process that strictly screens the applicants. They engage them according to Swiss law and based on strict terms of reference on the service expected from the advisers. Their national law governs the applicable law in relation to its customers.
- (f) The contract for the extended scope of products and the additional functionalities of the initial contract was signed in October 2015. Under the new contract SICPA is entitled to 13.25 Euros per 1000 stamps tabulated monthly at approximately Kshs. 1.50. SICPA invoices KRA on a monthly basis.
- (g) Before the negotiations with KRA, SICPA had a risk of accumulated unpaid invoices of significant amounts. The negotiations induced a commercial return and the economic model was viable as it ensured that the customer would be able to use their goods and services and be able to pay in return.
- (h) The contract did not provide for minimum and maximum amounts of stamps to be delivered at any given time and that they were only guided by the volumes that were produced at any given time. Further, this contract was not a fixed contract but based on the volume of stamps used.
- (i) That the volumes they anticipated from the Kenyan market were much less than what SICPA had initially anticipated but this is caused by external factors such as the pending court case but they considered this a business risk.
- (j) KRA had been paying for the stamps and the parts of the contract that had been implemented but not the suspended scope of products. The new invoicing scheme marks the stamps to tobacco, beer and wine products but does not cover the unimplemented goods.
- (k) KRA had paid 38.3 million Euros from October 2015 to July 2018 being the cost of approximately 3.16 billion stamps delivered and sold. KRA had anticipated that they would require approximately 3.5 billion stamps in three and a half years. SICPA had however anticipated the supply of approximately double the amount of stamps they have sold to KRA for the same period. KRA provided an initial data of

purchasing 700 million stamps per annum and with the additional scope of products, the number increased to 2- 2.8 billion stamps per year.

- (l) According to SICPA, they have not been able to implement the whole contract. This is because of the appeal pending at the Supreme Court. The contract shall be fully implemented when there is provision of stamps for the additional scope of products i.e. soft drinks, water and juice.
- (m) KRA drafted the contract with SICPA, the special conditions had some amendments such as the change of price, date, implementation period but the other terms remained constant.
- (n) According to SICPA, the contract between themselves and KRA was a fixed term contract that cannot be terminated by KRA and that if KRA terminates the contract, SICPA will be indemnified as it happens elsewhere globally unless SICPA is at fault or is in breach of the conditions set out in the contract.
- (o) As far as SICPA was concerned, the agreement between KRA and themselves had started but the period of five years had not commenced. This period will commence only after the full implementation of the scope of all the products covered in the 2015 contract.
- (p) The SICPA system allows a manufacturer to isolate products for export and this does not affect their competitiveness.
- (q) The contractual prices for the countries visited by KRA did not disclose their contract prices and prices are based on the solutions being sought by a tax administrator.
- (r) According to the agreement between KRA and SICPA, a centre of Excellence would be established once certain volumes of stamps were ordered. The volumes have not been realized but SICPA has set up regional centres with eighty-two employees to support the manufacturers and also support other customers within the region.



### **3.7.4 Submissions by the Kenya Revenue Authority Representative at the Meeting**

143. On the impropriety allegations against Mr. Masudi, Mr. Masudi responded that he had been to Germany once early 2017 together with Ms. Karambu to attend a two-day conference and the attendance was facilitated by the KRA and not Chris Essendi, the Director of Chess Limited. Mr. Masudi informed the meeting that he did not remember meeting with Christophe Renard at the tax stamp forum and that the two-day conference had a number of vendors that provide technologies and solutions relating to stamps and that he interacted with a number of people during the conference. He met several SICPA representatives and a few members of the SICPA Board, which had booth, and he engaged with members of SICPA Kenya. He admitted interacting with Mr. Michelle Categnaro but he could not remember meeting him in Germany. He further added that the information relating to the conference might be verified through the KRA records.
144. Mr. Masudi reported that the contract was prepared by a team in the legal office of the KRA based on the procurement requirements and the technical specifications contained in the tender documents. The draft contract was then analyzed and reviewed jointly by officers from the legal and business directorates of KRA. Before the process of contracting SICPA, KRA sought the advice and concurrence of the Attorney General and the same was granted to engage SICPA in direct procurement process.

### **3.7.5 Commencement of the Contract**

145. According to the KRA representative at the meeting, the commencement date of the existing contract with SICPA was February 2016. This is a different interpretation from the one derived by SICPA which believes that there has been “partial implementation” but it has not commenced.
146. The Cabinet Secretary for the National Treasury increased the goods subject to excise duty and subsequently KRA had to develop several scenarios and considered the possibility of engaging another party to provide similar solutions for the additional products but this was not easy as the manufacturers had communicated serious challenges in the implementation of EGMS including the lack of sufficient space for the installation

of the EGMS equipment. According to Mr. Masudi, employing a dual system would further complicate the challenges.

147. Further had the option to terminate the contract between KRA and SICPA been effected, KRA would have had to pay SICPA for the unimplemented period or the unutilised time in the contract and this would have been a huge and unnecessary expense. KRA therefore considered engagement and renegotiation with SICPA as the most viable option. KRA was alive to the fact that a variation of the product scope and cost of the EGMS system exceeded the allowable latitude for the variation of contract. Having sought the concurrence of the Attorney General and the Public Procurement Oversight Authority, KRA engaged SICPA SA through negotiation in the process of direct procurement.
148. In KRA's contention, the direct procurement process was not entered into abruptly but was a long discussion that involved numerous validation processes to meet the requirements of the law.

### **3.8 Evidence by the Public Procurement Regulatory Authority**

149. Mr. Maurice Juma, the Director General of the Public Procurement Regulatory Authority (PPRA) accompanied by Mr. Joram Mweresa (Compliance Officer) appeared before the Committee to adduce evidence on the procurement and implementation of the Excise Goods Management System. The Director General briefed the Committee as follows:

#### ***First Tender***

150. The procurement of Excise Goods Management System (EGMS) commenced in August 2010 through Expression of Interest (EOI) which was advertised on 19<sup>th</sup> August, 2010 and closed on 22<sup>nd</sup> September, 2010 at 12 Noon.
151. Nine out of twenty-one bidders were prequalified at the EOI stage and Request for Proposal (RFP) documents were issued on 17<sup>th</sup> June, 2011 to the following-
- (a) De La Rue Currency and Security Printers Ltd;
  - (b) Tall Security Print Ltd;
  - (c) Authentic Ltd;

- (d) Madras Security Printers Ltd;
- (e) Edaps Consortium;
- (f) American Banknote Co;
- (g) Filtrona PLC;
- (h) SICPA Security Solutions SA; and
- (i) Holistik India Ltd.

152. Of these, six companies submitted the RFP documents, including SICPA Security Solutions SA which scored 75.5% in the technical evaluation against a cut off score of 68%. SICPA's financial bid was opened on 30<sup>th</sup> September, 2011 and the financial proposal was for Euros 6,696,900 per annum or Euros 20,090,700 for three years.

153. The procurement was terminated as the quoted bids were higher than the budgeted amount of Kshs. 240 million.

#### *Second Tender*

154. After termination of the procurement proceedings, the procuring entity initiated another procurement process for Printing, Supply and Delivery of Security Revenue Stamps complete with Tracking and Trace System and Integrated Production Accounting System.

155. An international tender No./KRA/ICB-037/2011-2012 for Printing, Supply and Delivery of Security Revenue Stamps complete with Tracking and Trace System and Integrated Production Accounting System was advertised on 30<sup>th</sup> March, 2012 and closed on 30<sup>th</sup> May, 2012. It attracted seven (7) bidders namely:

- (h) Edaps Consortium – Ukraine
- (i) Holistik India Ltd. – India
- (j) Security Printing Press – India
- (k) De La Rue Currency and Security Print – Kenya
- (l) Madras Security Printers Ltd – India

(m) Authentic Inc. – USA

(n) SICPA Security Solutions SA – Switzerland

156. The evaluation committee recommended the award of the tender to SICPA Security Solutions SA at a total of Euro 42,471,464 or Kshs. 4,552,516,226 for five years at an exchange rate of Kshs. 107.19 to 1 Euro.
157. In its meeting held on 26<sup>th</sup> November, 2012, the tender committee awarded SICPA Security Solutions SA the tender for Supply and Delivery of Security Revenue Stamps complete with Tracking and Trace System and Integrated Production Accounting System at a total of Euro 42,471,464 or Kshs. 4,552,516,226 for five years at an exchange rate of Kshs. 107.19 to 1 Euro.
158. Kenya Revenue Authority and SICPA Security Solutions SA entered into a contract on 18<sup>th</sup> April, 2013 at a total cost of Euro 42,471,464 for a period of five years up to March 2019. The contract covered Printing, Supply and Delivery of Security Revenue Stamps for a period of five (5) years as follows:
- (a) Provision of 3,556,200,000 Security Printed Revenue Stamps for a period of five (5) years at a total cost of Euros 20,341,464 (Module 1).
  - (b) Provision of Track and race Software Solution for a period of five (5) years at a total cost of Euros. 10,450,000 (Module 1).
  - (c) Provision of Integrated Production Accounting System for a period of five (5) years at a total cost of Euros 11,680,000 (Module 2).
159. The contract covered three products namely tobacco, wines and spirits. The total estimated number of stamps was 3.55 billion.

#### ***Direct Procurement***

160. On 18<sup>th</sup> June 2013, the Cabinet Secretary for the National Treasury issued Legal Notice No. 110 of 18<sup>th</sup> June, 2013. The said Legal Notice required more products to be fixed with revenue stamps. The total estimated stamp consumption was revised to an estimate of 12.8 billion. The procurement through direct negotiation was initiated in January 2015

through negotiation with a view to expanding the scope of the contract dated 18<sup>th</sup> April, 2013 which was awarded to SICPA Security Solutions SA.

161. KRA's justification for using direct procurement was that the same software platform procured from SICPA Security Solutions in 2013 would be used to verify the authenticity of additional excisable products as per LN No. 110. The software had proprietary features developed by SICPA and was therefore unrealistic to envisage procurement of another software since it would not be compatible with the existing software platform.
162. KRA further stated that since SICPA had been contracted to provide the service for five (5) years, procuring another service provider to cater for the additional products introduced by the Customs and Excise (Excisable Goods Management System) Regulations, 2013, was not feasible. The Regulations expanded the scope of the system to cover all excisable goods except motor vehicles.
163. KRA also stated that there was no reasonable alternative that would have provided a solution compatible with the existing EGMS. Further, an alternative provider would have compelled business enterprises to install parallel EGMS facilities.
164. Another justification given by KRA was that previous tendering process had yielded one suitable service provider (SICPA).
165. The final justification given by KRA was that the previous contract could not be amended to include the new products as it would have gone beyond allowable limit of 25% contract variation.

### *Negotiation*

166. The negotiation committee held negotiations with SICPA Security Solutions SA between 7<sup>th</sup> and 15<sup>th</sup> January 2015. The purpose of negotiations was among other things, to extend the scope of the contract for Printing, supply and delivery of Security Revenue Stamps complete with track and trace system and integrated production system.

167. SICPA submitted its first proposal on 1<sup>st</sup> November, 2013 which among other things offered a price of Euro 13.61 per 1000 stamps excluding VA. This proposal was not competitive as per KRA's team point of view.
168. SICPA was requested to submit another proposal with a discount based on the additional business arising from the expanded scope of EGMS. SICPA submitted a revised proposal on 15<sup>th</sup> January, 2015 which among other things reduced the price to Euro 13.25 per 1000 stamps.
169. In its meeting held on 15<sup>th</sup> May, 2015 the tender committee awarded the subject tender to SICPA Security SA at a minimum estimated cost of Euro. 158,213,898 which was equivalent to Kshs. 15,909,293,482 for a period of five years (Euro 13.25 per 1000 stamps).

*Notification and Acceptance of the Award*

170. The award of the tender was communicated to SICPA Security Solutions SA vide letter Ref:KRA/HQS/DP/423/2014-2015 of 17<sup>th</sup> July 2015. The award was for a period of five years (2015/16 to 2019/20) at Euro 13.25 per 1000 stamps exclusive of VAT. The notification letter also informed them that it served as the intention of the procuring entity..” *to terminate the existing contract between us entered into on 18<sup>th</sup> April 2013.*”
171. SICPA accepted the offer vide their letter dated 30<sup>th</sup> July 2015. They also concurred with the intention of KRA to terminate the previous contract dated 18<sup>th</sup> April 2013.
172. KRA and SICPA entered into contract dated 30<sup>th</sup> October, 2015. The contract was for five (5) years at Euros 13.25 per 1000 stamps excluding VAT. The estimated total cost was Euros 15,909,293,482.
173. The contract dated 18<sup>th</sup> April 2013 was terminated vide letter Ref: KRA/HQS/ICB/037/2011-12 of 15<sup>th</sup> September, 2015. The effective date of termination was 30<sup>th</sup> September, 2015.

### *Choice of a Tendering Method and Reporting Requirements*

174. The subject procurement was processed under the ambit of the repealed Public Procurement and Disposal Act (2005) and its attendant legislations. Under the Act, the choice of the procurement methods and management of the procurement proceedings were at the discretion of the procuring entities. Open tender was the preferred method of procurement but entities were allowed to use alternative procurement methods as long as they met the conditions set out by the Act for each procurement method. However, entities are expected to submit reports on procurement activities when they are due. Towards this end, KRA submitted to the Authority the report on the use of direct procurement method for the subject procurement in accordance with Regulation 63 (2) of the Public Procurement and Disposal Regulations, 2006.

### *PPRA's Opinion on Adherence to the Law by KRA*

175. Based on the documents availed by KRA, the procurement was processed through direct procurement method as guided by Section 29 (2) and (3), 74 (2) and 75 of the Act.
176. A review of the procurement records availed by KRA indicated that the approval of the direct procurement method was done by the tender committee in its meeting held on 4<sup>th</sup> February, 2015 whereas negotiations between 7<sup>th</sup> and 15<sup>th</sup> January, 2015. This is contrary to Section 29 (3) of the Public Procurement and Disposal Act (2005) which provides that: *Section 29 (3) 'A procuring entity may use restricted tendering or direct procurement as an alternative procurement procedure only if, before using that procedure, the procuring entity:*
- (a) obtains the written approval of its tender committee; and,*
  - (b) records in writing the reasons for using the alternative procurement procedure.*
177. In this case, the negotiations between SICPA and KRA preceded the approval by the tender committee.

178. The award of the tender was made by the tender committee during its meeting held on 4<sup>th</sup> February, 2015. It was not clear how the same award was made by the tender committee in a meeting held on 15<sup>th</sup> May, 2015.

179. In the view of PPRA, KRA engaging SICPA Security Solutions SA for the extra scope of the assignment was a reasonable option based on the fact that the bidder had installed software for verification of stamps which had proprietary features.

### **3.9.0 Evidence from the State Law Office**

180. Mr. Kennedy Ogeto, the Solicitor-General, appeared before the committee on 18<sup>th</sup> October, 2018 and 25<sup>th</sup> October, 2018 to adduce evidence on the implementation of the KRA Excisable Goods Management System (EGMS). He informed the Committee as follows:

#### ***3.9.1 Procurement process***

##### ***First contract***

181. KRA vide letter dated 22<sup>nd</sup> February 2013, forwarded a copy of the draft Contract for the office's approval together with a tender approval form, letter of notification of award, letter of acceptance of award and copy of the approved minutes of the Authority's Tender Committee. From the documents reviewed, it was apparent that the procurement was open and competitive.

##### ***Second Contract***

182. Under the repealed Public Procurement and Disposal of Assets 2005, Section 29 provided that a procuring entity may use direct or restricted tendering as an alternative procurement procedure, only if before using that procedure, the procuring entity obtains written approval from its tender committee and records in writing the reasons for using, the alternative procurement procedure.

183. Additionally, Regulation 32 of the Public Procurement and Disposal Regulations, 2006, require that a procuring entity obtains the approval of the tender committee prior to terminating a contract. Further, Regulation 62 (3) of the Public Procurement and Disposal



Regulations, 2006, require a procuring entity to report any direct procurement of a value exceeding five hundred thousand shillings to the Public Procurement Oversight Authority (“the Authority”).

184. The KRA Tender Committee during its meeting held on 15th of May, 2015, deliberated on the proposal for the termination of the existing contract and the award of a New Contract and approved the termination of the existing contract with SICPA Security Solution SA. Use of Direct Procurement Method.
185. Further, the KRA vide a letter Ref. KRA/5/PSS13/2/10 dated 21st July, 2015 notified the PPOA of this direct procurement, in compliance with the law.
186. From the information obtained from KRA, the excise stamp is a security printed product whose design and security features are inbuilt and proprietary to its manufacturer. This intellectual property is unique to SICPA and therefore procuring an alternative manufacturer to produce a stamp with design and security features compatible with the tracking platform designed by SICPA, would not be practically possible. It was therefore imperative that direct procurement be the only procurement method applicable in this case.
187. Furthermore, since this Contract was a continuation and expansion of the previous contract, in the sense that SICPA had already began making investments in the line product, it would have been a burden on the tax payer to terminate the First Contract and retender afresh. This would have been necessitated by the fact that, SICPA would have been paid for the investments made while at the same time tendering a fresh provider and paying for the same.
188. Based on the foregoing, the Office of the Attorney General advised and gave clearance for the execution of the Contract, based on the information and documents that were furnished to it.

### 3.9.2 On Value for money

189. Value for money is assessed in terms of cost, quality, quantity and timelines of the delivered works, goods or services and this is promoted through effective competition, transparency and accountability during the procurement process.
190. The first procurement process for the EGMS was done open and competitively while the second procurement was done directly. This was to expand the scope of the first Contract to cover the expanded scope of the products by the Legal Notice 110 which required that all excise goods with exception of motor vehicles be affixed with stamps.
191. KRA informed the Office of the Attorney General that a decision to renegotiate the contract in order to achieve financial sustainability was made. The renegotiation was to expand the system to cover new products and provide a unified charge to cover all three project components; stamps, the track and trace system and the integrated production accounting system.
192. By achieving this, project funding risks would be transferred to the Service Provider as KRA would pay a fixed charge irrespective of the number of Production lines installed.
193. The prices negotiated in the 2015 Contract were based on the prices that were bid competitively in the 2013 Contract and the KRA was able to negotiate a reduced unit cost per stamp.
194. It is noted from the minutes of negotiations held between the KRA and SICPA on 7th January – 15<sup>th</sup> January, 2015 that KRA requested SICPA to shift to a new contractual pricing model based on price per stamp that would cover the full cost of the solutions and services. This was necessitated by the escalating cost in the Contract due to an increase in the number of equipment.
195. The office in assessing and reviewing the issue of value for money, reviewed the minutes of the negotiations and noted that the KRA was intent on bringing down the cost. It's therefore their view, in their deliberations, KRA was keen to ensure and promote prudent use of taxpayer's resources, to achieve a cost effective procurement.

196. Taking into account the explanations by KRA the issue of value for money was properly accounted for.

### **3.9.3 Commencement Dates**

#### **2013 Contract**

197. This Contract commenced on 18<sup>th</sup> April, 2013 and was for duration of 5 years.
198. The KRA in its letter of award of the 17<sup>th</sup> July, 2015 indicated that it intended to terminate the Contract. Subsequently, SICPA Security Solution SA in its letter dated the 30<sup>th</sup> July, 2015 accepted KRA's proposed termination, subject to both Parties having a written mutual agreement, with full and final effect on the date the Framework Contract is executed by the Parties

#### **2015 Contract**

199. Under Clause 3.33 of the Special Conditions of Contract, the Term of the Contract shall commence on the Effective Date and continue for five (5) years from the Start Date.
200. The Effective Date is defined to mean 1<sup>st</sup> October, 2015 while the Start Date means the date on which the Term of the Contract commences, which will be the date on which a Milestone Achievement certificate has been issued in respect of any Phase II Product or not later than six (6) Months after the Effective Date, provided the Conditions Precedent are met as provided under Clause 3.21.
201. In the event the Conditions Precedent are not met as provided above, the Start Date shall be postponed until completion of the Condition Precedent and receipt of the Milestone Achievement Certificate.
202. It is imperative to note that the Term of the Contract commences on 1<sup>st</sup> October, 2015 and continues for five (5) years from the Start Date, which implies, that the Term of the Contract effectively begins running, from the Start Date.

203. The Start Date can be deduced in the first instance dependent on the following:
- (a) issuance of a Milestone Achievement Certificate in respect of any Phase II Product;  
or
  - (b) not later than six (6) Months after the Effective Date, provided the Conditions Precedent are met as provided under Clause 3.21.
204. In this first instance, the Start date is dependent on either of the two conditions being met. The use of the word “or” makes the two conditions disjunctive and mutually exclusive.
205. In the Second Instance, if the Conditions Precedent are not met, the Start Date shall be postponed until:
- (a) completion of the Condition Precedent; and
  - (b) receipt of the Milestone Achievement Certificate.
206. In this instance, both the conditions must be fulfilled for the Start Date to begin.
207. For a Milestone Achievement Certificate to be issued KRA is required to conduct Global System Tests to validate relevant end to end functionality for each Product that is introduced in the SICPATRACE System.
208. SICPA is required to install this System at their own cost, and KRA is only required to conduct tests to validate end to end functionality.
209. Upon the successful completion of each set of Global System Tests and issuance of the Site & Line Installation Achievement Certificate, for each corresponding Automated Manufacturing Line & Importer, KRA shall issue a Milestone Achievement Certificate to SICPA.
210. KRA informed the Office of the AG the only Phase II product that had been issued with the Milestone Achievement Certificate is the beer product, which was issued sometime in February 2016. This effectively means that, the Contract term has commenced.

### **3.9.4 Cost Implications**

#### **First Contract**

211. The cost for this Contract was Euros 42,471,464 for a period of five years covering wines, spirits and tobacco.

#### **Second Contract**

212. This is a framework contract at a maximum Contract cost of Euros 170,615,399 covering the extended scope of the excisable goods. Under this Contract, SICPA is to be paid for the stamps actually delivered which is dependent on the producer usage.

### **3.9.5 Legal and Financial Implications of the two Contracts in the Event of Breach**

#### **First Contract**

213. This contract is already terminated and therefore there are no known legal implications in the event of breach.

#### **Second Contract**

214. Clause 3.17 Liquidated Damages of the General Conditions, provides that if the Contractor fails to deliver any or all of the Services within the period (s) specified in the Contract, the KRA shall, without prejudice to its other remedies under the contract, deduct from the contract, prices liquidated damages sum equivalent to 0.5% of the delivered price of the delayed items up to a maximum of 10% of the delayed Services.
215. Under Clause 3.8 Inspection and Tests of the General Conditions, should any inspected or tested goods fail to conform to the specification, KRA may reject the equipment, and SICPA shall either replace the rejected goods or make alterations, necessary to meet the specification requirements free of cost to KRA.
216. Under Clause 3.40 Limitation of Liability on the Special Conditions, in the event KRA suffers proven material direct loss or damage, as a result of negligence, gross misconduct, or willful misconduct of SICPA, in the supply of Services, SICPA shall pay KRA

damages of an amount equal to the direct loss or damage suffered but not exceeding 50% of the fees paid for the calendar year in question (or the portion thereof).

217. Under Clause 3.7 of the Special Conditions, SICPA was to provide within 30 days of notification of Contract award, a performance security in the amount of Euros 850,000. This amount is payable to KRA as compensation for any loss resulting from SICPA's failure to complete its obligations under the Contract.
218. The performance security shall be in the form of a bank guarantee or irrevocable letter of credit issued by a reputable bank located in Kenya or abroad acceptable to KRA. The performance security will only be discharged by KRA and returned, thirty (30) days following the completion of the performance obligations under the Contract.
219. By dint of the foregoing provisions of the Contract KRA was duly protected, in the event SICPA breached the Contract which compels SICPA, to pay compensation and damages to KRA. It further important to note that, the First Contract was terminated at the point the Second Contract was executed. This position is stipulated in the Notification of Award from KRA and in the letter of Acceptance by SICPA.

## CHAPTER FOUR

### 4.0 Committee Observations and Recommendations

#### 4.1 Observations

Arising from evidence adduced, the Committee made the following observations:

##### *Procurement Process*

1. Pursuant to section 78 of the Public Procurement and Disposal of Assets Act 2005, an Expression of Interest (EoI) which as provided for in sub-section (1) is in form of a notice inviting persons to submit expressions of interest is a pre-qualification requirement and does not constitute a tender as envisaged in section 59(3) of the Public Procurement and Disposal of Assets Act 2005.
2. The Committee further observed that although the Deputy Commissioner for Procurement and Supplies Services wrote to the Evaluation Committee requesting a review of the expression of interest report to consider the impact of the digitization on KRA, there was no evidence tabled before the Committee to show that the action by the Deputy Commissioner interfered with the independence of Evaluation Committee as the Committee solely developed the evaluation criteria for the tender.
3. That although section 26(6) of the Public Procurement and Disposal Act provides that a procurement entity shall not commence any procurement procedure until it is satisfied that sufficient funds have been set aside in its budget to meet the obligations of the resulting contract, the Committee observed that the EGMS programme was to be a self-funding as the manufactures were charged Kshs. 1.00 per stamp. The question of whether section 26 (6) of the Public Procurement and Disposal Act was complied with by KRA may not therefore be sustained in light of the self-funding nature of the EGMS programme. Further, the evidence adduced by the Hon. Joshua Kutuny with respect to irregularities in the procurement process was not substantiated.
4. Based on the evidence adduced by KRA, the Committee observed that the need to review the pricing mechanism and consequently the contract may have been justified by the

expansion of the scope of excise goods which the EGMS was to be used on and the need to ensure sustainability of the programme.

5. The Committee observed that KRA sought advice from the Solicitor-General and the Public Procurement Regulatory Authority in seeking to renegotiate with SICPA the contract terms.
6. Based on evidence submitted to the Committee, it was not possible for KRA to procure an alternative manufacturer to produce a stamp with design and security features compatible with tracking platform designed by SICPA without transfer of intellectual property rights to another supplier by SICPA.
7. Further, based on evidence adduced to the Committee, the Committee observed that an alternative or substitute for the service to be provided by SICPA to KRA would have led to loss of public funds as a new contract with a different supplier would have led to installation of new systems at a cost despite there being existing systems already installed by SICPA at KRA.
8. In view of paragraphs (6) and (7), the use of direct procurement by KRA met the requirements of section 74(2) of the Public Procurement and Disposal of Assets Act .
9. The Committee observed that the Office of the Attorney-General gave clearance for the execution of the contract between KRA and SICPA in terms of compliance with the Public Procurement and Disposal of Assets Act 2005 and Public Procurement and Disposal Regulations, 2006 in regard to the procurement process.
10. In light of paragraph (9) above, the procurement of the EGMS by KRA in the First, Second and Third contracts through SICPA complied and conformed with the Public Procurement and Disposal of Assets Act.

#### *Value for Money*

11. Based on evidence adduced before the Committee, the issue for value for money in the procurement process by KRA was taken into consideration based on the following grounds-



- (a) The EGMS system was geared towards eliminating the manual method of affixing excise and revenue stamps which led to loss of revenue collection due to rampant counterfeiting of stamps.
  - (b) The objective of the EGMS was also to widen the tax bracket which would have increased the amount of tax collected by KRA.
  - (c) As a result of the implementation of EGMS , there has been an increase in amounts of excise duty collected for example on certain consumer goods like wines and spirits where collection of excise duty had increased between 12% and 43%.
  - (d) The use of direct procurement by KRA in the third EGMS contract reduced the cost from Kshs. 1.7 which would have been the cost of the previous contract arrangement to Kshs. 1.417 as it allowed for renegotiation of the arrangement between KRA and SICPA.
  - (e) The EGMS can assist other government bodies such as the Kenya Bureau of Standards and the Anti-Counterfeit Agency in matters relating to fight against counterfeiting and ensuring quality and standards of consumer goods.
12. The Office of the Attorney-General through the Solicitor-General confirmed that having reviewed the contract documents submitted by KRA, the execution of the contract between KRA and SICPA ensured and promoted prudent use of tax payers' resources to achieve a cost effective procurement.
13. The evidence adduced by the Kenya Association of Manufacturers with regard to the cost of implementation of the EGMS was not substantiated.

***Submission of Legal Notice 110 of 2013***

14. The Committee observed that KRA had alluded to the fact that the National Treasury had submitted the Legal Notice 110 of 2013 to the National Assembly together with other budget documents.
15. The Committee also observed that the Excise Duty (Excisable Goods Management Systems) Regulations, 2017 which sought to repeal the Legal Notice 110 of 2013 were also submitted to the National Assembly and received in the Office of the Clerk of the

National Assembly *vide* a letter copied to the Chairperson of the Delegated Legislation Committee dated 11<sup>th</sup> April, 2017.

16. The Committee therefore observed that KRA did not violate the Statutory Instruments Act, 2013 in terms of submission of Legal Notices to the National Assembly as the National Treasury did indeed submit the respective Legal Notices to the National Assembly in accordance with the law.
17. The Committee further observed that pursuant to section 11(1) of the Statutory Instruments Act No. 23 of 2013, the Cabinet Secretary for National Treasury is required to ensure that within seven sitting days after the publication of a statutory instrument, a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before the respective House of Parliament. Further, section 11(3) of the Statutory Instruments Act No. 23 of 2013 provides that the responsible Clerk shall register every statutory instrument transmitted to the House for tabling.
18. The Committee noted that the House was however on recess and the Regulations were subsequently tabled in the House on 10<sup>th</sup> May, 2017 a date which was within the prescribed seven sitting days.
19. The Committee also observed that, following the tabling, the said Regulations stood referred to the Committee on Delegated Legislation for consideration pursuant to Standing Order 210 of the National Assembly Standing Orders and section 12 of the Statutory Instruments Act No. 23 of 2013, which provides that every statutory instrument issued, made or established after the commencement of the Act shall upon tabling before the respective House of Parliament stand referred to the Committee established for the purpose of reviewing and scrutinizing statutory instruments.
20. Further, pursuant to section 15(1) of the Statutory Instruments Act No. 23 of 2013, the Committee is required to make a report to the House containing only a resolution that the statutory instruments referred to the Committee be revoked and unless a specific provision exists in law requiring an express approval of the House on specified regulations (such as those under the Elections Act, 2011, Parliament does not engage in approving or amending all or part of statutory instrument. Only an annulling resolution is contemplated where the relevant Committee moves the House to resolve as such, within the specified period.

21. Additionally, section 15(2) of the Statutory Instruments Act No. 23 of 2013 further provides that “where the Committee does not make the report referred to in subsection (1) within twenty-eight days after the date of referral of the statutory instrument to the Committee under section 12, or such other period as the House may, by resolution approve, the statutory instrument shall be deemed to have fully met the relevant considerations referred to in section 13 of the Act.
22. In view of the foregoing, the Committee observed that the Committee on Delegated Legislation did not however meet to deliberate on the Regulations and make a report to the House within twenty-eight days after the date of referral of the Regulations to the Committee as required by law. In this regard, the Committee observed that the Excise Duty (Excisable Goods Management Systems) Regulations, 2017 came into force on 7<sup>th</sup> June, 2017, which is twenty-eight (28) days after 10<sup>th</sup> May, 2017 in accordance with the provisions of sections 11, 12 and 15(2) of the of the Statutory Instruments Act No. 23 of 2013.

#### ***Public Participation***

23. The KRA demonstrated to the Committee that it undertook public participation by engaging affected sectors in the excise industry including manufacturers of tobacco, wines and spirits and held consultative meetings carried out in different dates as detailed in the Report. The Kenya Association of Manufacturers confirmed to the Committee of having engaged in consultations with KRA and National Treasury regarding the implication of EGMS on manner of doing business by manufacturers further evidencing that KRA engaged in public participation. There is however need for KRA to be conducting extensive public participation prior to implementing systems such as EGMS including consulting the consumers of excisable goods.

#### ***Inefficiencies due to Duplication of Work***

24. The Committee observed that, there is a likelihood of duplication of work between KRA, Kenya Bureau of Standards and the Anti-Counterfeit Agency due to the multiplicity of stamps and systems used by the three bodies in performance of their respective functions.

### *Need for coordinated efforts in Procurement*

25. The Committee also observed that, it would be more prudent for the KRA, Kenya Bureau of Standards and the Anti-Counterfeit Agency, to have procured the EGMS services together noting the system is relied upon by the three bodies so as to ensure a coordinated approach in dealing with counterfeits which would in turn reduce loss of public funds occasioned by reduction in amount of taxes collected by KRA as a result of counterfeit goods.

### *Pending cases*

26. The Committee observed that the High Court Case (*Okiya Omtatah Okiiti versus KRA, - Petition Number 532 of 2017*) which had declared the procurement process of the EGMS as being irregular and against the law was appealed by KRA and SICPA and stay orders against the decision of the High Court granted by the Court of Appeal. The appeal against the stay orders was subsequently filed by Okiya Omtatah at the Supreme Court and is still pending and hence the stay orders are still in effect. The Committee observed that the court processes were a threat to the implementation of the EGMS which would lead to loss of public funds.

### *Background Information of SICPA*

27. The Committee observed that SICPA is a Swiss company and is a worldwide leader of security inks for currencies and sensitive documents, including identity documents for secure traceability of products subject to excise duties, such as alcohol and tobacco stamps. The Committee also observed that SICPA has presence in over 30 countries including Morocco, Tanzania and Brazil.
28. Despite the Committee writing to the Ministry of Foreign Affairs (Kenya) asking for any information regarding impropriety of SICPA in other countries, the Committee had not received any response at the time of compiling its report.

### *Commencement of the Contracts*

29. Based on evidence adduced by the Solicitor-General, the Committee observed that the First Contract commenced on 18<sup>th</sup> April, 2013 and was for duration of 5 years. The

contract was however terminated upon the execution of the Second Contract. The second Contract commenced in February 2016 when the 'First Milestone Achievement Certificate' was issued and shall run for five years.

30. KRA was advised by PPRA and Office of the Attorney-General that they could proceed with the procurement process.

#### 4.2 Recommendations by the Committee

Based on the observations, the Committee recommends that -

1. Whereas Kenya Association of Manufacturers and Kenya Revenue Authority confirmed that there was public participation in the roll-out of the Excisable Goods Management System, the Kenya Revenue Authority, the Kenya Bureau of Standards and the Anti-Counterfeit Agency should conduct extensive and all-inclusive public participation prior to implementing systems such as EGMS.
2. Subject to paragraph (1) above, Parliament should legislate on a law on public participation as provided for in the Constitution.
3. The Kenya Revenue Authority should share their current Excisable Goods Management Systems with the Kenya Bureau of Standards and the Anti-Counterfeit Agency at no extra cost to the manufacturers.
4. Upon expiry of the existing contract, the Kenya Revenue Authority, the Kenya Bureau of Standards and the Anti-Counterfeit Agency should develop a multifunctional stamp for use by the three government entities, or any other that will need the system, which will ensure efficient monitoring and reduce wastage of public funds utilized in developing different stamps.
5. Parliament should amend the relevant laws to exempt "plain drinking water" from any taxation.

Sign .....

Hon. Abdullswamad Sharrif Nassir, MP

CHAIRPERSON, PUBLIC INVESTMENT COMMITTEE

Date.....

30/04/2019.

## ANNEXES

- 1) ADOPTION LIST
- 2) COMMITTEE MINUTES
- 3) SPECIAL AUDIT REPORT
- 4) MINUTES OF THE SPICAL TENDER COMMITTEE HELD ON 15<sup>TH</sup> MAY 2015
- 5) MINUTES OF THE NEGOTIATING TEAM BETWEEN KRA AND SICPA HELD BETWEEN 7<sup>TH</sup> AND 15<sup>TH</sup> JANUARY 2015
- 6) KRA LETTER TO TO PPOA REPORTING DIRECT PROCUREMENT
- 7) KRA LETTER TO AG REPORTING DIRECT CONTRACT
- 8) AG'S LETTER TO KRA ON CONTRACT AND DIRECT PROCUREMENT
- 9) COMMITTEE'S LETTER TO THE MINISTRY OF FOREIGN AFFAIRS
- 10) LETTER FROM THE CLERK OF THE NATIONAL ASSEMBLY TO KRA REGARDING LEGAL NOTICE NO. 53 OF MARCH 2017.
- 11) LEGAL NOTICE NOTICE NO.110 OF 18<sup>TH</sup> JUNE 2013

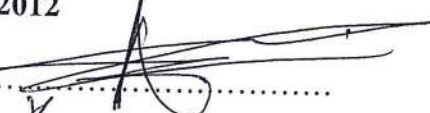
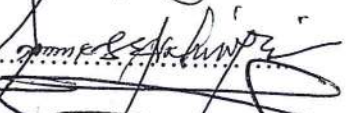

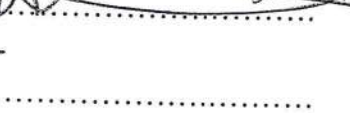

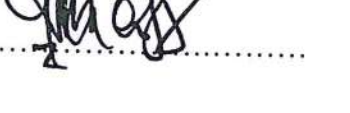
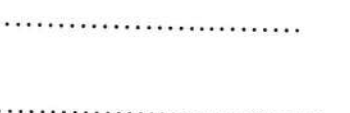
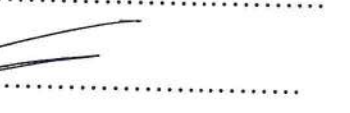
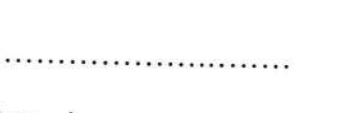




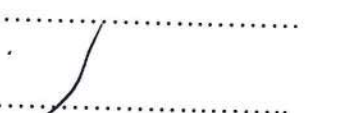





# ANNEX 1 – ADOPTION LIST



**ADOPTION LIST OF THE REPORT OF THE COMMITTEE ON THE INQUIRY INTO ALLEGATIONS OF PROCUREMENT IRREGULARITIES IN THE AWARD OF THE KENYA REVENUE AUTHORITY TENDER NO. KRA/HQS/DP-423/2014-2015 AND TENDER NO. KRA/HQS/ICB-037/2011-2012**

1. Hon. Abdullswamad Sharrif Nassir, MP (Chairperson).....
2. Hon. Ahmed Abdisalan Ibrahim, MP (Vice-Chairperson).....
3. Hon. (Dr.) Chrisantus Wamalwa Wakhungu, CBS, MP.....
4. Hon. Raphael Bitta Sauti Wanjala, MP.....
5. Hon. Justus Kizito Mugali, MP.....
6. Hon. Gladys Nyasuna Wanga, MP.....
7. Hon. John Muchiri Nyaga, MP.....
8. Hon. (Prof.) Mohamud Sheikh Mohammed, MP.....
9. Hon. Babu Owino Paul Ongili, MP.....
10. Hon. James Githua Kamau Wamacukuru, MP.....
11. Hon. Joash Nyamache Nyamoko, MP.....
12. Hon. Mary Wamaua Waithira Njoroge, MP.....
13. Hon. Mohamed Hire Garane, MP.....
14. Hon. Omar Mohamed Maalim Hassan, MP.....
15. Hon. Paul Kahindi Katana, MP.....
16. Hon. Purity Wangui Ngirici, MP.....
17. Hon. Rashid Kassim Amin, MP.....
18. Hon. Zachary Kwenya Thuku, MP.....



ANNEX 2 –  
COMMITTEE MINUTES



MINUTES OF THE 18<sup>TH</sup> SITTING OF THE PUBLIC INVESTMENTS COMMITTEE HELD ON SATURDAY 30<sup>TH</sup> MARCH 2019 IN THE CONFERENCE ROOM, THIRD FLOOR, ENGLISH POINT MARINA, MOMBASA AT 1315HRS.

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**PRESENT**

1. The Hon. Ahmed Abdisalan Ibrahim, MP (Vice chairman and chairing the meeting)
2. The Hon. Dr. Chrisantus Wamalwa Wakhungu, CBS, MP
3. The Hon. Raphael Bitta Sauti Wanjala, MP
4. The Hon. Mary Wamaua Njoroge, MP
5. The Hon. Purity Wangui Ngirici, MP
6. The Hon. Abdullswamad Sharrif Nassir, MP (Chairman)
7. The Hon. Thuku Zachary Kwenya, M.P
8. The Hon. John Muchiri Nyaga, M.P
9. The Hon. James Kamau Githua Wamacukuru, M.P
10. The Hon. Paul Kahindi Katana, MP
11. The Hon. Justus Kizito Mugali, MP

**ABSENT WITH APOLOGY**

1. The Hon. Joash Nyamache Nyamoko, HSC, MP
2. The Hon. Gladys Wanga, MP
3. The Hon. (Prof.) Mohamud Sheikh Mohammed, MP
4. The Hon. Rashid Kassim Amin, MP
5. The Hon. Omar Mohamed Maalim Hassan, MP
6. The Hon. Babu Owino Paul Ongili, MP
7. The Hon. Mohamed Hire Garane, M.P.

**IN ATTENDANCE**

**NATIONAL ASSEMBLY SECRETARIAT**

- |                        |   |                             |
|------------------------|---|-----------------------------|
| 1. Ms. Florence Abonyo | - | Director Committee Services |
| 2. Mr. John Mutega     | - | Principal Clerk Assistant I |
| 3. Mr. Evans Oanda     | - | Senior Clerk Assistant      |
| 4. Mr. Mohamed Boru    | - | Third Clerk Assistant       |
| 5. Mr. Alex Mutuku     | - | Senior Serjeant-At-Arms     |
| 6. Ms. Sharon Rotino   | - | Research Officer III        |
| 7. Ms. Noelle Chelagat | - | Media Relations Officer III |
| 8. Ms. Winfred Atieno  | - | Audio Recording Officer     |
| 9. Mr. Thomas Ogwel    | - | Fiscal Analyst              |

**MIN/PIC/2019/106: PRELIMINARIES**

The Vice/Chairperson called the meeting to order at fifteen minutes past one O'clock followed by a word of prayer.

**MIN/PIC/2019/107: CONSIDERATION OF THE DRAFT REPORT ON  
PROCUREMENT AND IMPLEMENTATION OF THE EGMS BY  
KRA**

The Committee went through the report that it had adopted in the previous meeting and confirmed that the contents of the report were as adopted. Specifically, the Committee confirmed the accuracy of the following paragraphs:

- (a) Paragraph 20(b) on inclusion of the 21 firms that bid for the First EGMS tender
- (b) Paragraph 20(c) on inclusion of the 9 prequalified bidders
- (c) Paragraph 3 on inclusion of the procurement process by including a provision that the averment of made therein had not been substantiated.
- (d) Paragraph 28 on the fact that the Committee wrote but never received any response from the Ministry of Foreign Affairs on any improprieties of SICPA Security Solutions SA in other countries
- (e) Paragraph 30 on correspondence between KRA and PPRA regarding the procurement.

**MIN/PIC/2019/108: ANY OTHER BUSINESS**

Accommodation while in Mombasa. The Committee deliberated on the Liaison Committee resolution backlisting English point Hotel from a list of Hotels prequalified to accommodate the Committee. It observed that the Hotel in question had improved on the issues it had been accused of and therefore suitable for use by the Committee as it is close to the airport and secure. Therefore the Hotel remained the first among equals whenever the Committee seeks for accommodation in Mombasa.

Since it was a liaison Committee decision, the Chairman was urged to present the Committee decision to liaison when it sits next.

**MIN/PIC/2019/109: ADJOURNMENT**

The meeting was adjourned at thirty minutes past one O'clock.

Signed .....

  
The Hon. Abdullswamad Sharrif Nassir, MP

(Chairperson)

Date.....  




**MINUTES OF THE 17<sup>TH</sup> SITTING OF THE PUBLIC INVESTMENTS COMMITTEE HELD ON FRIDAY, 29<sup>TH</sup> MARCH 2019 IN MAIN CONFERENCE ROOM, ENGLISH POINT MARINA AT 3.00 P.M.**

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**PRESENT**

1. The Hon. Abdullswamad Sharrif Nassir, MP (Chairman)
2. The Hon. Ahmed Abdisalan Ibrahim, MP (Vice chairman)
3. The Hon. Dr. Chrisantus Wamalwa Wakhungu, MP
4. The Hon. Raphael Bitta Sauti Wanjala, MP
5. The Hon. Gladys Wanga, MP
6. The Hon. Purity Wangui Ngirici, MP
7. The Hon. Thuku Zachary Kwenya, M.P
8. The Hon. Mary Wamaua Njoroge, MP
9. The Hon. John Muchiri Nyaga, M.P
10. The Hon. James Kamau Githua Wamacukuru, M.P
11. The Hon. Mohamed Hire Garane, M.P.
12. The Hon. Paul Kahindi Katana, MP
13. The Hon. Joash Nyamache Nyamoko, MP
14. The Hon. Justus Kizito Mugali, MP
15. The Hon. Omar Mohamed Maalim Hassan, MP

**ABSENT WITH APOLOGY**

1. The Hon. (Prof.) Mohamud Sheikh Mohammed, MP
2. The Hon. Babu Owino Paul Ongili, MP
3. The Hon. Rashid Kassim Amin, MP

**IN ATTENDANCE**

**NATIONAL ASSEMBLY SECRETARIAT**

- |                         |   |                              |
|-------------------------|---|------------------------------|
| 1. Mrs. Florence Abonyo | - | Director, Committee Services |
| 2. Mr. John Mutega      | - | Principal Clerk Assistant    |
| 3. Mr. Evans Oanda      | - | Senior Clerk Assistant       |
| 4. Mr. Mohamed Boru     | - | Clerk Assistant III          |
| 5. Ms. Sharon Rotino    | - | Research Officer             |
| 6. Ms. Marlene Ayiro    | - | Legal Counsel                |
| 7. Mr. Thomas Ogwel     | - | Fiscal Analyst               |
| 8. Ms. Winfred Atieno   | - | Audio Recording Officer      |

**IN ATTENDANCE**

**OFFICE OF THE AUDITOR GENERAL**

- |                         |   |                |
|-------------------------|---|----------------|
| 1. Mr. Joshiah Oyuko    | - | Manager, Audit |
| 2. Dr. Sammy Kimungunyi | - | Manager, Audit |

**MIN/PIC/102/2019: PRELIMINARIES**

The Chairperson called the meeting to order at twenty minutes past three O'clock



followed by a word of prayer.

**MIN/PIC/103/2019:            CONSIDERATION OF THE DRAFT REPORT ON THE INQUIRY  
   INTO THE PROCUREMENT OF THE EGMS SYTEM BY THE  
   KENYA REVENUE AUTHORITY**

The Chairperson took the Committee through the draft report on the inquiry into the procurement of the EGMS system by the Kenya Revenue Authority and adopted it unanimously with the following amendments:

1. Under Section 2.4 on Expression of Interest (EOI) for Provision of Security Printing and Digital Solutions, parts (b), (c) and (f) should indicate the names of the companies that expressed interest for provision of the referenced service.
2. Under Tender Number KRA/HQs/ICB-037/2011-12, the names of the companies that took part in the tender should be indicated.
3. Inclusion of a paragraph that the Kenya Association of Manufacturers did not substantiate the information they shared regarding the pricing cost of Excise stamps in other jurisdictions.
4. Inclusion of a paragraph indicating that the Kenya Revenue Authority and the State Law Office confirmed that the third contract for EGMS began in 2016 when the first milestone was attained as per the contract terms.
5. Inclusion of a paragraph indication that the Kenya Revenue Authority sough advise of the State Law Office before commencing the procurement for the EGMS system.
6. Inclusion of a paragraph indicating that the documents tabled before the Committee by the Hon. Joshua Kuttuny, MP could not be substantiated.
7. Inclusion of paragraph indicating that the Committee wrote to the Ministry of Foreign Affairs seeking information on the cost of Excise Stamps in Brazil by SICPA SA. No response has been received on the matter.
8. Inclusion of a paragraph exempting taxation of plain drinking water.

**Committee Recommendations**

The Committee made the following recommendations:

1. Whereas Kenya Association of Manufacturers and Kenya Revenue Authority confirmed that there was public participation in the roll-out of the Excisable Goods Management System, the Kenya Revenue Authority, the Kenya Bureau of Standards and the Anti-Counterfeit Agency should conduct extensive and all-inclusive public participation prior to implementing systems such as EGMS.
2. Subject to paragraph (1) above, Parliament should legislate on a law on public participation as provided for in the Constitution.



3. The Kenya Revenue Authority should share their current Excisable Goods Management Systems with the Kenya Bureau of Standards and the Anti-Counterfeit Agency at no extra cost to the manufacturers.
4. Upon expiry of the existing contract, the Kenya Revenue Authority, the Kenya Bureau of Standards and the Anti-Counterfeit Agency should develop a multifunctional stamp for use by the three government entities, or any other that will need the system, which will ensure efficient monitoring and reduce wastage of public funds utilized in developing different stamps.
5. Parliament should amend the relevant laws to exempt "plain drinking water" from any taxation.

MIN/PIC/104/2019: ANY OTHER BUSINESS

No other business arose.

MIN/PIC/105/2019: ADJOURNMENT

The meeting was adjourned at forty minutes past twelve O'clock.

Signed .....

The Hon. Abdullswamad Sharrif Nassir, MP  
(Chairperson)

Date.....

04/04/2019.



MINUTES OF THE 2<sup>ND</sup> SITTING OF THE PUBLIC INVESTMENTS COMMITTEE HELD ON THURSDAY, 7<sup>TH</sup> FEBRUARY 2019 IN MAIN CONFERENCE ROOM, ENGLISH POINT MARINA AT 2.30 P.M.

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**PRESENT**

1. The Hon. Abdullswamad Sharrif Nassir, MP (Chairman)
2. The Hon. Dr. Chrisantus Wamalwa Wakhungu, MP
3. The Hon. Raphael Bitta Sauti Wanjala, MP
4. The Hon. Purity Wangui Ngirici, MP
5. The Hon. Thuku Zachary Kwenya, M.P
6. The Hon. Mary Wamaua Njoroge, MP
7. The Hon. John Muchiri Nyaga, M.P
8. The Hon. James Kamau Githua Wamacukuru, M.P
9. The Hon. Mohamed Hire Garane, M.P.
10. The Hon. Paul Kahindi Katana, MP
11. The Hon. Joash Nyamache Nyamoko, MP
12. The Hon. Babu Owino Paul Ongili, MP
13. The Hon. Justus Kizito Mugali, MP
14. The Hon. Omar Mohamed Maalim Hassan, MP
15. The Hon. Rashid Kassim Amin, MP

**ABSENT WITH APOLOGY**

1. The Hon. Ahmed Abdisalan Ibrahim, MP (Vice chairman)
2. The Hon. Gladys Wanga, MP
3. The Hon. (Prof.) Mohamud Sheikh Mohammed, MP

**IN ATTENDANCE**

**NATIONAL ASSEMBLY SECRETARIAT**

- |                       |   |                         |
|-----------------------|---|-------------------------|
| 1. Mr. Evans Oanda    | - | Senior Clerk Assistant  |
| 2. Mr. Mohamed Boru   | - | Clerk Assistant III     |
| 3. Ms. Sharon Rotino  | - | Research Officer        |
| 4. Mr. Sidney Lugaga  | - | Legal Counsel           |
| 5. Ms. Winfred Atieno | - | Audio Recording Officer |

**IN ATTENDANCE**

**OFFICE OF THE AUDITOR GENERAL**

- |                         |   |                |
|-------------------------|---|----------------|
| 1. Mr. Joshiah Oyuko    | - | Manager, Audit |
| 2. Dr. Sammy Kimungunyi | - | Manager, Audit |

**MIN/PIC/005/2019: PRELIMINARIES**

The Chairperson called the meeting to order at thirty five minutes past two O'clock followed by a word of prayer.

MIN/PIC/006/2019:            CONSIDERATION OF THE DRAFT REPORT ON THE INQUIRY  
   INTO THE PROCUREMENT OF THE EGMS SYETEM BY THE  
   KENYA REVENUE AUTHORITY

The Committee went through the draft report on the inquiry into the procurement of the EGMS system by the Kenya Revenue Authority and resolved to postpone making recommendations to allow time to get the following information:

1. Technical evaluation report for the Second EGMS tender - *the auditors present in the meeting produced the requested report;*
2. Report from PPRA indicating whether or not any player complained of the procurement process - *The submission by PPRA had been captured in the report with no indication whether any bidders complained;*
3. How long the Auditor General's office will take to conduct a value for money audit - *the auditors present indicated that it will take a minimum of 36 weeks;*
4. Impact of variation of the scope of in the second tender by the KRA Deputy Commissioner in charge of procurement - *secretariat to ask the Auditor General to provide a report on the same;*

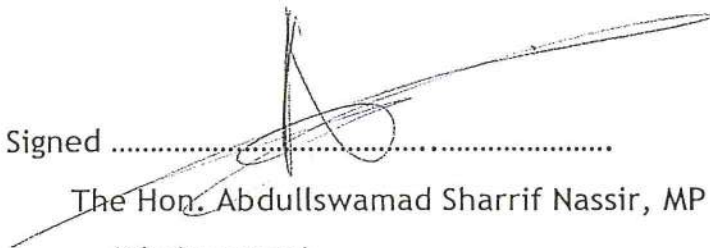
MIN/PIC/007/2019:            ANY OTHER BUSINESS

No other business arose.

MIN/PIC/008/2019:            ADJOURNMENT

The meeting was adjourned at fifty six minutes past three O'clock.

Signed .....

  
The Hon. Abdullswamad Sharrif Nassir, MP  
(Chairperson)

Date.....*26/07/2019*.....



MINUTES OF THE 1<sup>ST</sup> SITTING OF THE PUBLIC INVESTMENTS COMMITTEE HELD ON THURSDAY, 7<sup>TH</sup> FEBRUARY 2019 IN MAIN CONFERENCE ROOM, ENGLISH POINT MARINA AT 11.00 A.M.

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**PRESENT**

1. The Hon. Abdullswamad Sharrif Nassir, MP (Chairman)
2. The Hon. Dr. Chrisantus Wamalwa Wakhungu, MP
3. The Hon. Raphael Bitta Sauti Wanjala, MP
4. The Hon. Purity Wangui Ngirici, MP
5. The Hon. Thuku Zachary Kwenya, M.P
6. The Hon. Mary Wamaua Njoroge, MP
7. The Hon. John Muchiri Nyaga, M.P
8. The Hon. James Kamau Githua Wamacukuru, M.P
9. The Hon. Mohamed Hire Garane, M.P.
10. The Hon. Paul Kahindi Katana, MP
11. The Hon. Joash Nyamache Nyamoko, MP
12. The Hon. Babu Owino Paul Ongili, MP
13. The Hon. Justus Kizito Mugali, MP
14. The Hon. Omar Mohamed Maalim Hassan, MP
15. The Hon. Rashid Kassim Amin, MP

**ABSENT WITH APOLOGY**

1. The Hon. Ahmed Abdisalan Ibrahim, MP (Vice chairman)
2. The Hon. Gladys Wanga, MP
3. The Hon. (Prof.) Mohamud Sheikh Mohammed, MP

**IN ATTENDANCE**

**NATIONAL ASSEMBLY SECRETARIAT**

- |                       |   |                         |
|-----------------------|---|-------------------------|
| 1. Mr. Evans Oanda    | - | Senior Clerk Assistant  |
| 2. Mr. Mohamed Boru   | - | Clerk Assistant III     |
| 3. Ms. Sharon Rotino  | - | Research Officer        |
| 4. Mr. Sidney Lugaga  | - | Legal Counsel           |
| 5. Ms. Winfred Atieno | - | Audio Recording Officer |

**IN ATTENDANCE**

**OFFICE OF THE AUDITOR GENERAL**

- |                         |   |                |
|-------------------------|---|----------------|
| 1. Mr. Joshiah Oyuko    | - | Manager, Audit |
| 2. Dr. Sammy Kimungunyi | - | Manager, Audit |

**MIN/PIC/001/2019: PRELIMINARIES**

The Chairperson called the meeting to order at twenty minutes past eleven O'clock followed by a word of prayer.

**MIN/PIC/002/2019: CONSIDERATION OF THE DRAFT REPORT ON THE INQUIRY INTO THE PROCUREMENT OF THE EGMS SYETEM BY THE KENYA REVENUE AUTHORITY**

The Chairperson took the Committee through the draft report on the inquiry into the procurement of the EGMS system by the Kenya Revenue Authority and made the following observations:

1. The matter under inquiry by the Committee with regards to the procurement of the Excise Goods Management System is the subject of a Petition No. 532 Of 2017 in the High Court against the Commissioner General of KRA, the Cabinet Secretary for the National Treasury and SICPA Solutions SA ("SICPA"), the Swiss firm that had been awarded a tender by KRA to implement EGMS.
2. In this petition, the petitioner faulted the legality of both Legal Notice No. 110 of 18<sup>th</sup> June 2013 and Gazette Notice No. 12856 of 5<sup>th</sup> September 2013 for want of meeting constructional dictates of public participation; and irregular procurement process of the impugned EGMS.
3. The issues raised for determination in the said petition were essentially similar to the terms of reference under which the Auditor General prepared the Special Audit.

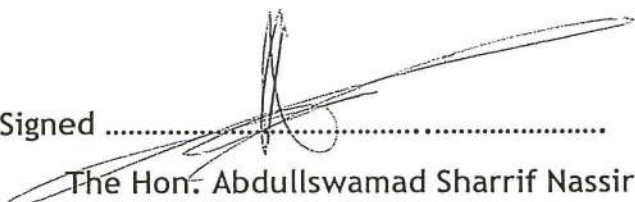
**MIN/PIC/003/2019: ANY OTHER BUSINESS**

No other business arose.

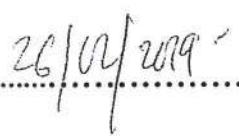
**MIN/PIC/004/2019: ADJOURNMENT**

The meeting was adjourned at forty minutes past twelve O'clock.

Signed .....

  
The Hon. Abdullswamad Sharrif Nassir, MP  
(Chairperson)

Date.....

  
26/02/2019

MINUTES OF THE 84<sup>TH</sup> SITTING OF THE PUBLIC INVESTMENTS COMMITTEE HELD ON THURSDAY 25<sup>TH</sup> OCTOBER 2018 IN ROOM 7, MAIN PARLIAMENT BUILDINGS AT 10.40 A.M.

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**PRESENT**

1. The Hon. Abdullswamad Sharrif Nassir, MP (Chairman)
2. The Hon. Ahmed Abdisalan Ibrahim, MP (Vice chairman)
3. The Hon. Paul Kahindi Katana, MP
4. The Hon. Purity Wangui Ngirici, MP
5. The Hon. Dr. Chrisantus Wamalwa Wakhungu, MP
6. The Hon. Ahmed Kolosh Mohamed, MP
7. The Hon. James Kamau Githua Wamacukuru, M.P
8. The Hon. Thuku Zachary Kwenya, M.P
9. The Hon. Raphael Bitta Sauti Wanjala, MP
10. The Hon. Gladys Wanga, MP
11. The Hon. Babu Owino Paul Ongili, MP
12. The Hon. Rashid Kassim Amin, MP

**ABSENT WITH APOLOGY**

1. The Hon. Mohamed Hire Garane, M.P.
2. The Hon. Justus Gesito, MP
3. The Hon. (Prof.) Mohamud Sheikh Mohammed, MP
4. The Hon. Joash Nyamache Nyamoko, MP
5. The Hon. Mary Wamaua Waithira Njoroge, MP
6. The Hon. Omar Mohamed Maalim Hassan, MP
7. The Hon. John Muchiri Nyaga, M.P

**IN ATTENDANCE**

**NATIONAL ASSEMBLY SECRETARIAT**

- |                        |   |                         |
|------------------------|---|-------------------------|
| 1. Mr. Evans Oanda     | - | Senior Clerk Assistant  |
| 2. MS. Doreen karani   | - | Legal Counsel           |
| 3. Mr. Thomas Ogwel    | - | Fiscal Analyst          |
| 4. Ms. Noelle Chelagat | - | Media Relations Officer |
| 5. Ms. Winnie Atieno   | - | Audio Recording Officer |

**IN ATTENDANCE**

- |                         |   |                                    |
|-------------------------|---|------------------------------------|
| 6. Dr. Sammy Kimungunyi | - | Deputy Director, Audit             |
| 7. Mr. Joshiah Oyuko    | - | Manager, Audit                     |
| 8. Mr. Charles Kiage    | - | Manager, Audit                     |
| 9. Ms. Joyce Wesonga    | - | Inspectorate of State Corporations |

**MIN/PIC/412/2018: PRELIMINARIES**

The Vice Chairperson called the meeting to order at forty one minutes past ten

O'clock with a word of prayer from the Hon. Gladys Wanga, MP

MIN/PIC/413/2018: PRESENTATION FROM THE SOLICITOR GENERAL ON THE  
EGMS CONTRACT

Mr. Kennedy Ogeto, the Solicitor General accompanied by Mr. Nelvis Ombasa and Ms. Rachael Wanjiku appeared before the Committee to adduce evidence on the contract on EGMS being implemented by the SCIPA SA. He briefed the Committee as follows:

PROCUREMENT

1<sup>st</sup> Contract

1. KRA vide letter dated 22<sup>nd</sup> February, 2013, forwarded a copy of the draft Contract for the AG's approval together with a tender approval form, letter of notification of award, letter of acceptance of award and copy of the approved minutes of the Authority's Tender Committee.
2. From the documents the AG reviewed, it was apparent that the procurement was open and competitive.

2<sup>nd</sup> Contract

3. Under the repealed Public Procurement and Disposal of Assets 2005, Section 29 provides that a procuring entity may use direct or restricted tendering as an alternative procurement procedure, only if before using that procedure, the procuring entity obtains written approval from its tender committee and records in writing the reasons for using, the alternative procurement procedure.
4. Additionally, Regulation 32 of the Public Procurement and Disposal Regulations, 2006, require that a procuring entity obtains the approval of the tender committee prior to terminating a contract. Further, Regulation 62 (3) of the Public Procurement and Disposal Regulations, 2006, require a procuring entity to report any direct procurement of a value exceeding five hundred thousand shillings to the Public Procurement Oversight Authority ("the Authority).
5. The KRA Tender Committee during its meeting held on 15<sup>th</sup> of May, 2015, deliberated on the proposal for the termination of the existing contract and the award of a New Contract and approved the Termination of the existing contract with SICPA Security Solution SA. Use of Direct Procurement Method. (*Minutes were availed*).

6. Further, the KRA vide letter Ref. KRA/5/PSS13/2/10 dated 21<sup>st</sup> July, 2015 notified the Authority of this direct procurement, in compliance with the law. (*Letter availed*).
7. From the information obtained from KRA, which the Attorney General verily believed to be true the excise stamp was a security printed product whose design and security features were inbuilt and proprietary to its manufacturer. This intellectual property is unique to SICPA and therefore procuring an alternative manufacturer to produce a stamp with design and security features compatible with the tracking platform designed by SICPA, would not be practically possible. It was therefore imperative that direct procurement be the only procurement method applicable in this case.
8. Furthermore since this Contract was a continuation and expansion of the previous contract, in the sense that SICPA had already began making investments in the line product, it would have been a burden on the tax payer to terminate the First Contract and retender afresh. This would have been necessitated by the fact that, SICPA would have been paid for the investments made while at the same time tendering a fresh provider and paying for the same.
9. Based and foregoing, we wish to reiterate our position that, our Office advised and gave our clearance for the execution of the Contract, based on the information and documents that were furnished to our office. We wish to state that, we were satisfied that, the procurement was in compliance with the law.

#### VALUE FOR MONEY

10. Value for money is assessed in terms of cost, quality, quantity and timelines of the delivered works, goods or services and this is promoted through effective competition, transparency and accountability during the procurement process.
11. The first procurement process for the EGMS was done open and competitively while the second procurement was done directly. This was to expand the scope of the first Contract to cover the expanded scope of the products by the Legal Notice 110 which required that all excise goods with exception of motor vehicles be affixed with stamps.
12. KRA informed us, which information we verily believe to be true that a decision to renegotiate the contract in order to achieve financial sustainability was made. The renegotiation was to expand the system to cover new products and provide a unified charge to cover all three project components; stamps, the track and trace system and the integrated production accounting system.

13. By achieving this, project funding risks would be transferred to the Service Provider as KRA would pay a fixed charge irrespective of the number of Production lines installed.
14. The prices negotiated in the 2015 Contract were based on the prices that were bid competitively in the 2013 Contract and the KRA was able to negotiate a reduced unit cost per stamp.
15. It is noted from the minutes of negotiations held between the KRA and SICPA on 7<sup>th</sup> January - 15<sup>th</sup> January, 2015 that KRA requested SICPA to shift to a new contractual pricing model based on price per stamp that would cover the full cost of the solutions and services. This was necessitated by the escalating cost in the Contract due to an increase in the number of equipment.
16. The AG in assessing and reviewing the issue of value for money, reviewed the minutes of the negotiations and noted that the KRA was intent on bringing down the cost. In the AG's view, in their deliberations, KRA was keen to ensure and promote prudent use of taxpayer's resources, to achieve a cost effective procurement.
17. In the AG's view, taking into account the explanations by KRA the issue of value for money was properly accounted for.

#### COMMENCEMENT DATES

##### 2013 CONTRACT

18. This Contract commenced on 18<sup>th</sup> April, 2013 and was for a duration of 5 years.
19. The KRA in its letter of award of the 17<sup>th</sup> July, 2015 indicated that it intended to terminate the Contract. Subsequently, SICPA in its letter dated the 30<sup>th</sup> July, 2015 accepted KRA's proposed termination, subject to both Parties having a written mutual agreement, with full and final effect on the date the Framework Contract is executed by the Parties. (*Letters were availed*).

##### 2015 CONTRACT

20. Under Clause 3.33 of the Special Conditions of Contract, the Term of the Contract shall commence on the Effective Date and continue for five (5) years from the Start Date.
21. The Effective Date is defined to mean 1<sup>st</sup> October 2015 while the Start Date means the date on which the Term of the Contract commences, which will be the date on which a Milestone Achievement certificate has been issued in respect of any Phase II Product or not later than six (6) Months after the Effective Date, provided the Conditions Precedent are met as provided under Clause 3.21.

In the event the Conditions Precedent are not met as provided above, the Start Date shall be postponed until completion of the Condition Precedent and receipt of the Milestone Achievement Certificate.

22. It is imperative to note that the Term of the Contract commences on 1<sup>st</sup> October, 2015 and continues for five (5) years from the Start Date, which in our understanding implies, that the Term of the Contract effectively begins running, from the Start Date.

23. The Start Date can be deduced in the first instance dependent on the following:

- a. issuance of a Milestone Achievement Certificate in respect of any Phase II Product; or
- b. not later than six (6) Months after the Effective Date, provided the Conditions Precedent are met as provided under Clause 3.21.

24. In our interpretation, in this first instance, the Start date is dependent on either of the two conditions being met. The use of the word "or" *makes the two conditions disjunctive* and mutually exclusive.

25. In the Second Instance, if the Conditions Precedent are not met, the Start Date shall be postponed until:

- a. completion of the Condition Precedent; and
- b. receipt of the Milestone Achievement Certificate.

In this instance, both the conditions must be fulfilled for the Start Date to begin.

26. For a Milestone Achievement Certificate to be issued KRA is required to conduct Global System Tests to validate relevant end to end functionality for each Product that is introduced in the SICPATRACE System.

27. The SICPA is required to install this System at their own cost, and KRA is only required to conduct tests to validate end to end functionality.

28. Upon the successful completion of each set of Global System Tests and issuance of the Site & Line Installation Achievement Certificate, for each corresponding Automated Manufacturing Line & Importer, KRA shall issue a Milestone Achievement Certificate to SICPA.

29. KRA have since informed the AG, which information the office of the AG verily believe to be true that, the only Phase II product that has been able to be issued with the Milestone Achievement Certificate is the beer product, which was issued sometime in February 2016. This effectively means that, the Contract term has commenced.

## COST IMPLICATION

### First Contract

30. The cost for this Contract was Euros 42,471,464 for a period of five years covering wines, spirits and tobacco.

### Second Contract

31. This is a framework contract at a maximum Contract cost of Euros 170,615,399 covering the extended scope of the excisable goods. Under this Contract, SICPA is to be paid for the stamps actually delivered which is dependent on the producer usage.

## LEGAL AND FINANCIAL IMPLICATIONS OF THE TWO CONTRACTS IN THE EVENT OF BREACH

### First Contract

32. This contract is already terminated and therefore there are no known legal implications in the event of breach.

### 2<sup>nd</sup> Contract

33. Clause 3.17 Liquidated Damages of the General Conditions, provides that if the Contractor fails to deliver any or all of the Services within the period (s) specified in the Contract, the KRA shall, without prejudice to its other remedies under the contract, deduct from the contract, prices liquidated damages sum equivalent to 0.5% of the delivered price of the delayed items up to a maximum of 10% of the delayed Services.
34. Under Clause 3.8 Inspection and Tests of the General Conditions, should any inspected or tested goods fail to conform to the specification, KRA may reject the equipment, and SICPA shall either replace the rejected goods or make alterations, necessary to meet the specification requirements free of cost to KRA.
35. Under Clause 3.40 Limitation of Liability on the Special Conditions, in the event KRA suffers proven material direct loss or damage, as a result of negligence, gross misconduct, or willful misconduct of SICPA, in the supply of Services, SICPA shall pay KRA damages of an amount equal to the direct loss or damage suffered but not exceeding 50 % of the fees paid for the calendar year in question (or the portion thereof).
36. Under Clause 3.7 of the Special Conditions, SICPA was to provide within 30 days of notification of Contract award, a performance security in the amount of Euros 850,000. This amount is payable to KRA as compensation for any loss resulting from SICPA's failure to complete its obligations under the Contract.



The performance security shall be in the form of a bank guarantee or irrevocable letter of credit issued by a reputable bank located in Kenya or abroad acceptable to KRA. The performance security will only be discharged by KRA and returned, thirty (30) days following the completion of the performance obligations under the Contract.

37. By dint of the foregoing provisions of the Contract, the AG's office was satisfied that KRA was duly protected, in the event SICPA breached the Contract which compels SICPA, to pay compensation and damages to KRA. It further important to note that, the First Contract was terminated at the point the Second Contract was executed. This position is stipulated in the Notification of Award from KRA and in the Letter of Acceptance by SICPA.

## COMMITTEE OBSERVATIONS

### Procurement process:

1. The Office of the Attorney General was given a drawn contract from the KRA for review which contract the office reviewed and approved with modifications. Ordinarily, the AG is supposed to draft agreements on behalf of any Government entity by dint of Section 5 of the Office of the Attorney General Act. But due to capacity challenges, this is not done.
2. The Office of the AG did not do any due diligence of the contract while reviewing it. It only relied on faith that the KRA had done the right thing
3. The first contract was terminated and ushered in the second contract with expanded scope of products. This was to implement the legal Notice No. 110 of 18<sup>th</sup> June 2013.
4. The use of direct procurement could not be justified under sections 29 and 74 of the Public Procurement and Asset Disposal Act of 2005 in that the scope of products negotiated for in the first contract were only three as opposed to many products in the second contract; there could have been new entrants into the market that could have bided for the contract; and there was no cost benefit analysis done the investments made by SCIPA on proprietary software to ascertain whether or not the benefits outweighed the losses.

### Contract duration

5. The first contract had begun, executed partially and terminated without legal recourse.
6. The Second contract begun in February 2016 after issuance of Milestone Achievement Certificate. It will run for a period of 5 years
7. Court cases
8. The Solicitor General confirmed that the procurement process of the EGMS is a matter that is alive in court currently. He however denied that the allegations

that his office was representing KRA in court and also pointed out that his advice had not been sought by the KRA. The specific pleadings in court would be shared with the Committee the following day.

MIN/PIC/414/2018: ANY OTHER BUSINESS

No other business arose.

MIN/PIC/415/2018: ADJOURNMENT

The meeting was adjourned at thirty minutes past twelve O'clock.

Signed.....

Date..... 31/10/2018

The Hon. Abdullswamad Sharrif Nassir, MP

(Chairperson)

MINUTES OF THE 81<sup>ST</sup> SITTING OF THE PUBLIC INVESTMENTS COMMITTEE HELD ON  
~~THURSDAY 18<sup>TH</sup>~~ <sup>TUESDAY 16<sup>TH</sup></sup> OCTOBER 2018 IN ROOM 7, MAIN PARLIAMENT BUILDINGS AT 10.40  
A.M.

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**PRESENT**

1. The Hon. Abdullswamad Sharrif Nassir, MP (Chairman)
2. The Hon. Ahmed Abdisalan Ibrahim, MP (Vice chairman)
3. The Hon. Purity Wangui Ngirici, MP
4. The Hon. Dr. Chrisantus Wamalwa Wakhungu, MP
5. The Hon. Ahmed Kolosh Mohamed, MP
6. The Hon. James Kamau Githua Wamacukuru, M.P
7. The Hon. Thuku Zachary Kwenya, M.P
8. The Hon. Gladys Wanga, MP
9. The Hon. Babu Owino Paul Ongili, MP
10. The Hon. Rashid Kassim Amin, MP
11. The Hon. Mohamed Hire Garane, M.P
12. The Hon. (Prof.) Mohamud Sheikh Mohammed, MP
13. The Hon. Joash Nyamache Nyamoko, MP
14. The Hon. Omar Mohamed Maalim Hassan, MP
15. The Hon. John Muchiri Nyaga, M.P

**ABSENT WITH APOLOGY**

1. The Hon. Justus Gesito, MP
2. The Hon. Paul Kahindi Katana, MP
3. The Hon. Mary Wamaua Waithira Njoroge, MP
4. The Hon. Raphael Bitta Sauti Wanjala, MP

**IN ATTENDANCE**

**NATIONAL ASSEMBLY SECRETARIAT**

- |                        |   |                         |
|------------------------|---|-------------------------|
| 1. Mr. Evans Oanda     | - | Senior Clerk Assistant  |
| 2. Mr. Mohamed Boru    | - | Third Clerk Assistant   |
| 3. Ms. Sharon Rotino   | - | Legal Counsel           |
| 4. Mr. Thòmas Ogwel    | - | Fiscal Analyst          |
| 5. Ms. Noëlle Chelagat | - | Media Relations Officer |
| 6. Ms. Winnie Atieno   | - | Audio Recording Officer |

**IN ATTENDANCE**

- |                         |   |                                    |
|-------------------------|---|------------------------------------|
| 7. Dr. Sammy Kimungunyi | - | Deputy Director, Audit             |
| 8. Mr. Joshiah Oyuko    | - | Manager, Audit                     |
| 9. Mr. Charles Kiage    | - | Manager, Audit                     |
| 10. Ms. Joyce Wesonga   | - | Inspectorate of State Corporations |

**MIN/PIC/399/2018: PRELIMINARIES**

The Chairperson called the meeting to order at twenty six minutes past ten O'clock with a word of prayer.

**MIN/PIC/400/2018: EVIDENCE BY THE SOLICITOR GENERAL ON THE EGMS CONTRACT**

Mr. Kennedy Ogeto, the Solicitor General accompanied by Mr. Nelvis Ombasa and Ms. Rachael Wanjiku appeared before the Committee to adduce evidence on the contract on EGMS being implemented by the SCIPA SA. He briefed the Committee as follows:

Background

**2013 Contract**

1. The KRA by a letter Ref. No. KRA/L8/1060/789 dated the 22<sup>nd</sup> February, 2013 informed the Office of the Attorney General that it had completed the procurement process for the printing, supply and delivery of security revenue stamps complete with track and trace system and integrated production accounting system for collection of tax on cigarettes, wines and spirits. This tender had been awarded to SICPA Security Solutions SA.
2. It is through this letter that the KRA forwarded a copy of the draft Contract for the Office of Attorney General's approval together with a tender approval form, letter of notification of award, letter of acceptance of award and copy of the approved minutes of the Authority's Tender Committee. However, the Office of the Attorney General is unable to find copies of these documents as forwarded by KRA in our records, though KRA indicate them as attached in their letter.
3. Nevertheless, the Office of the Attorney General Office by letter Ref. No. AG/CONF/2/C/61 VOL. VII (49) dated the 1<sup>st</sup> March, 2013, gave comments on the draft Contract and requested the KRA to resubmit the amended draft Contract for perusal, prior to execution.
4. The KRA by their letter Ref. No. KRA/L8/1060/941 dated the 10<sup>th</sup> April, 2013 indicated that they had incorporated all the comments the Office of the Attorney General had made and had amended the Contract accordingly. In the above letter, KRA indicated that, they were resubmitting the revised Contract for the Office of the Attorney General's approval, but only forwarded a copy of the revised Special Conditions of Contract, without the Contract.
5. The Office of the Attorney General reviewed the same and vide letter dated 10<sup>th</sup> April, 2013, observed that upon review of the revised Contract, their concerns had been addressed, save for comments on the Clause on Representation and Warranties. The Office of the Attorney General advised KRA that, upon making the amendment as advised on the Clause on Representation and Warranties, the

Contract shall be deemed sound from a legal stand point and may be executed.

6. It is evident from the Office of the Attorney General's records that the Office reviewed and gave its clearance for the execution of the Contract between KRA and SICPA. The Contract was executed on the 18<sup>th</sup> April, 2013 and was to run for a period of five (5) years.

### 2015 Draft Contract

7. Thereafter, the KRA by the letter Ref. No. KRA/5/BS12/8/C/78 dated the 24<sup>th</sup> June, 2015 informed the Office of the Attorney General that, the government had amended the Excisable Goods Management System Regulations vide Legal Notice No. 110 of 18<sup>th</sup> June, 2013, and expanded the scope of the system to cover, all excisable goods except motor vehicles. They stated that the amendment had come into force after the, Contract KRA and SICPA dated 18<sup>th</sup> April, 2013 had been executed.
8. In the letter KRA indicated that the Contract as signed, was being implemented to cover only three (3) products Tobacco, Wines and Spirits but the amendment to the Regulations required every package of excisable goods, except motor vehicles, manufactured in or imported into Kenya, be affixed with an excise stamp.
9. According to KRA in their letter, the signed Contract could not cover the products provided in the said Regulations due to the following reasons:
  - i. The signed Contract was for 3.55 billion stamps whereas the extended scope was estimated to require 12,876,633,899 stamps;
  - ii. The signed Contract only covered three (3) products and not all the excisable goods provided for under the Regulations;
  - iii. Using the signed Contract on the extended scope would result in higher unit costs and consequently funding constraints;
  - iv. The project cost limited the number of production line equipment and any additional line would generate an additional cost which would be unsustainable; and
  - v. Any variation to the signed Contract to extend its scope would most likely exceed the permitted 25% cumulative variation of a contract.
10. The KRA had assessed the Contract and noted that, in its current form, it would not be possible to apply the new products as the amended Regulations required, therefore KRA, intimated that they had directly procured SICPA Security Solutions SA, to implement the extended scope of the new products.
11. The KRA explained that the use of direct procurement had been recommended pursuant to section 74(2) Public Procurement and Disposal Act, 2005 (the Act)

which states that, 'a procuring entity may use direct procurement if it is satisfied that there is no reasonable alternative or substitute for the goods, works or services.'

12. Additionally, for the KRA to justify the Direct Procurement to implement the extended scope, stated as follows:

- a. SICPA Security Solutions SA had proprietary rights over the current system;
- b. variation of the contract, to include the extended scope of products, would be beyond the scope that was allowable under the Procurement Act, 2005; and
- c. the two previous tendering processes, had yielded SICPA Security Solutions SA as the only suitable bidder.

They further contended that, SICPA Security Solutions SA had been the successful bidder in two other previous tendering processes.

13. By dint of the foregoing, KRA therefore requested the Office of the Attorney General to review the proposed draft Contract and the draft notification of award.

14. The Office reviewed the same and noted the following:

- a. SICPA Security Solutions SA, would be engaged under a new tender No. KRA/HQS/DP/423/2014-2015;
- b. KRA and SICPA Security Solutions SA, had held negotiations based on the existing Contract and had accepted an offer by SICPA Security Solutions SA for the System for a period of five (5) years, at a total cost of Euros One Hundred and Fifty Eight Million, Two Hundred and Thirteen Thousand, Eight Hundred and Ninety Eight (Euros 158,213,898 - equivalent to Kshs. 15,909,293,482);
- c. The draft Notification of Award, would also serve as a Notification for the termination of the existing Contract that was signed on the 18<sup>th</sup> April, 2013 and that the award of the new Contract to SICPA Security Solutions SA, would only be valid and effective, upon and from the date that, SICPA Security Solutions SA:
  - i. accepted the termination; and
  - ii. executing a report detailing, the subsisting rights or liabilities transiting into the new Contract.

This condition is pursuant to Clause 3.32 (1) (d) of the Special Conditions of Contract, that provides that *termination of an agreement does not for whatever reason, affect any accrued rights and liabilities of any Party*"

15. The Draft Letter of Notification required SICPA Security Solutions SA, to enter into negotiations on the transition report, give their comments on the Draft Contract as well as to write an acceptance letter.
16. The Office of the Attorney General reviewed the documents and advised KRA vide our letter dated the 1<sup>st</sup> July, 2015 that the draft Contract and Notification of Awards, were in order and they should be executed, subject to compliance with the provisions of the Public Procurement and Disposal Act, 2005. The Office particularly drew KRA's attention to section 27 of the Act which provides:
- (1) A public entity shall ensure that this Act, the regulations and any directions of the Authority are complied with respect to each of its procurements.*
  - (2) The accounting officer of a public entity shall be primarily responsible for ensuring that the public entity fulfils its obligations under subsection (1).*
  - (3) Each employee of a public entity and each member of a board or committee of the public entity shall ensure, within the areas of responsibility of the employee or member, that this Act, the regulations and any directions of the Authority are complied with.*
  - (4) Contractors, suppliers and consultants shall comply with all the provisions of this Act and the regulations.*
  - (5) The accounting officer may use the procurement unit and tender committee of another procuring entity which shall carry out the procurement in accordance with this Act and the regulations.*
  - (6) 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 instances as may be prescribed.*
17. The Office of the Attorney General also requested KRA to submit a signed copy of the minutes of negotiations held between it and SICPA on 7<sup>th</sup> January - 15<sup>th</sup> January, 2015 as the copy furnished to the Office was not signed.
18. It is imperative to note that, there has been no further correspondence between the Office of the Attorney General and KRA, on this matter and the Office is therefore unable to comment as to whether, the matter was progressed as envisaged. Further, the Office of the Attorney General was unsure about the state of implementation of the Contract signed in 2013.

## Conclusion

### The Office of the Attorney General input on the Contracts between KRA and SICPA Security Solutions SA

#### First Contract

19. The Office of the Attorney General received a letter Ref. No. KRA/L8/1060/789 dated the 22<sup>nd</sup> February, 2013 from the KRA informing our Office that, it had completed the procurement process and had awarded SICPA Security Solutions SA, the Contract for the printing, supply and delivery of security revenue stamps complete with track and trace system and integrated production accounting system for collection of tax on cigarettes, wines and spirits. They requested the Office to review the same before execution.
20. The Office of the Attorney General reviewed and responded by letter Ref. No. AG/CONF/2/C/61 VOL. VII (49) dated the 1<sup>st</sup> March, 2013, giving comments on the draft Contract and requested the KRA to resubmit the amended draft Contract for perusal, prior to execution.
21. The KRA wrote back vide their letter Ref. No. KRA/L8/1060/941 dated the 10<sup>th</sup> April, 2013, resubmitted the revised Contract for the Office of the Attorney General's approval.
22. The Office reviewed the same and vide letter dated 10<sup>th</sup> April, 2013, advised KRA that, upon making the amendment as advised on the Clause on Representation and Warranties, the Contract shall be deemed sound from a legal stand point and may be executed.

#### 2<sup>nd</sup> Contract

23. The Office of the Attorney General received a letter from KRA by the letter Ref. No. KRA/5/BS12/8/C/78 dated the 24<sup>th</sup> June, 2015, intimating that the government had amended the Excisable Goods Management System Regulations vide Legal Notice No. 110 of 18<sup>th</sup> June, 2013, and expanded the scope of the system to cover, all excisable goods except motor vehicles. KRA therefore intended to directly procure SICPA Security Solutions SA, and enter into a new Contract to cover expanded the scope of the new products. They requested the Office of the Attorney General to review the proposed draft Contract and the draft notification of award.
24. The Office of the Attorney General reviewed the draft Contract and the draft notification of award and advised KRA vide letter dated the 1<sup>st</sup> July, 2015 that the draft Contract and Notification of Awards, were in order and they should be executed, subject to compliance with the provisions of the Public Procurement and Disposal Act, 2005.



## Commencement Dates

### First Contract

25. The Contract that was executed on the 18<sup>th</sup> April, 2013 and therefore it is deemed to have come into force, once it was executed. It was to run for a period of five (5) years.

### Second Contract

26. According to the draft Letter of Award, the 2015 draft Contract was to be valid and effective upon, SICPA Security Solutions SA, accepting termination of the earlier Contract and execution of transition report detailing the rights or liabilities of the Parties, as they transit into the new Contract. It was to run for a period of five (5) years.

27. In view of the fact that, the Office of the Attorney General does not know whether SICPA Security Solutions SA, wrote the letter of acceptance, of the notification of award, the Office of the Attorney General is unable to establish the Commencement date of the second Contract.

## Cost implications

### First Contract

28. The Contract was for the sum of was stated as Euros Forty Two Million Four Hundred and Seventy One Thousand Four Hundred and Sixty Four (Euros 42,471,464.00).

### Second Contract

29. The Contract was for a total cost of Euros One Hundred and Fifty Eight Million, Two Hundred and Thirteen Thousand, Eight Hundred and Ninety Eight (Euros 158,213,898 - equivalent to Kshs. 15,909,293,482).

## Expiry of the Contract

### First Contract

30. The Contract was for a period of five (5) years. Pursuant to the draft notification of award for the Second Contract, this Contract was terminate, once SICPA Security Solutions SA accepted the notification of award for the Second Contract and executing a report detailing, the subsisting rights or liabilities transiting into the new Contract.

### Second Contract

31. The Contract was for a period of five (5) years. The Office of the Attorney General is unable to establish the date of expiry of this Contract, since the Office has no

information as to whether it was executed by the parties.

### Committee Observations

The Committee made the following observations:

1. The Office of the Attorney General was not involved in drafting the contract for the Excise Goods Management System between Kenya Revenue Authority and SICPA Security Solutions SA. The Office however reviewed the draft contract and gave legal advise including review of the section on 'Special Conditions of the Contract'.
2. The Office of the Attorney General saw that there would be value for money in the tender as it involved competitive bidding.
3. The Office of the Attorney General was satisfied that the use of Direct procurement was justified in this case as provided for by Section 74 (2) of the Public Procurement and Disposal of Assets Act (2005), based on the reasons provided by the Kenya Revenue Authority.
4. The Office of the Attorney General could not ascertain the expiry date of the second contract.

### Committee Resolutions

The Committee made the following resolutions:

1. The Solicitor General should re-appear before the Committee to provide information on the contract including the commencement date and expiry date as well as matters to do with proprietary rights that advised KRA's direct procurement of the EGMS.

MIN/PIC/401/2018: ANY OTHER BUSINESS

No other business arose.

MIN/PIC/402/2018: ADJOURNMENT

The meeting was adjourned at thirty eight minutes past twelve O'clock.

Signed.....

The Hon. Abdullswamad Sharrif Nassir, MP

(Chairperson)

Date.....

31/10/2018

MINUTES OF THE 80<sup>TH</sup> SITTING OF THE PUBLIC INVESTMENTS COMMITTEE HELD ON THURSDAY, 11<sup>TH</sup> OCTOBER, 2018 IN ROOM 7, MAIN PARLIAMENT BUILDINGS AT 10.00 A.M.

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**PRESENT**

1. The Hon. Abdullswamad Sharrif Nassir, MP (Chairman)
2. The Hon. Ahmed Abdisalan Ibrahim, MP (Vice chairman)
3. The Hon. Chrisantus Wamalwa Wakhungu, MP
4. The Hon. (Prof.) Mohamud Sheikh Mohammed, MP
5. The Hon. Thuku Zachary Kwenya, M.P
6. The Hon. John Muchiri Nyaga, M.P
7. The Hon. Omar Mohamed Maalim Hassan, MP
8. The Hon. James Kamau Githua Wamacukuru, M.P
9. The Hon. Joash Nyamache Nyamoko, MP
10. The Hon. Mohamed Hire Garane, M.P.
11. The Hon. Mary Wamaua Waithira Njoroge, MP
12. The Hon. Rashid Kassim Amin, MP

**ABSENT WITH APOLOGY**

1. The Hon. Raphael Bitta Sauti Wanjala, MP
2. The Hon. Gideon Mutemi Mulyungi, MP
3. The Hon. Purity Wangui Ngirici, MP
4. The Hon. Nicholas Scott Tindi Mwale, MP
5. The Hon. Ahmed Kolosh Mohamed, MP
6. The Hon. Paul Kahindi Katana, MP
7. The Hon. Babu Owino Paul Ongili, MP

**IN ATTENDANCE**

**NATIONAL ASSEMBLY SECRETARIAT**

- |                       |   |                         |
|-----------------------|---|-------------------------|
| 1. Mr. Mohamed Boru   | - | Clerk Assistant II      |
| 2. Ms. Sharon Rotino  | - | Research Officer        |
| 3. Mr. Thomas Ogwel   | - | Fiscal Analyst          |
| 4. Ms. Noel Chelagat  | - | Media Relations Officer |
| 5. Ms. Winfred Otieno | - | Audio Recording Officer |

**IN ATTENDANCE**

- |                         |   |   |
|-------------------------|---|---|
| 1. Dr. Sammy Kimungunyi | - | Deputy Director, Audit                    |
| 2. Mr. Joshiah Oyuko    | - | Manager, Audit                            |
| 3. Mr. Charles Kiage    | - | Manager, Audit                            |
| 4. Mr. John Kisegu      | - | Assistant Inspector General, Corporations |

MIN/ PIC/394/2018:      **PRELIMINARIES**

The Chairperson called the meeting to order at eight minutes past ten O'clock.

MIN/ PIC/395/2018:      **CONFIRMATION OF MINUTES**

Confirmation of minutes was deferred to the next sitting.

**MIN/PIC/396/2018: EVIDENCE BY THE PUBLIC PROCUREMENT REGULATORY AUTHORITY**

Mr. Maurice Juma, the Director General of the Public Procurement Regulatory Authority (PPRA) accompanied by Mr. Joram Mweresa (Compliance Officer) appeared before the Committee to adduce evidence on the procurement and implementation of the Excise Goods Management System.

The Director General briefed the Committee as follows:

**First Tender**

1. The procurement of Excise Goods Management System (EGMS) commenced in August 2010 through Expression of Interest (EOI) which was advertised on 19<sup>th</sup> August, 2010 and closed on 22<sup>nd</sup> September, 2010 at 12 noon.
2. Nine out of twenty one bidders were prequalified at the EOI stage and Request for Proposal (RFP) documents were issued on 17<sup>th</sup> June, 2011 to
  - a. De La Rue Currency and Security Printers Ltd.
  - b. Tall Security Print Ltd.
  - c. Authentic Ltd.
  - d. Madras Security Printers Ltd.
  - e. Edaps Consortium
  - f. American Banknote Co.
  - g. Filtrona PLC
  - h. SICPA Security Solutions SA
  - i. Holistik India Ltd.
3. Of these, six companies submitted the RFP documents, including SICPA Security Solutions SA which scored 75.5% in the technical evaluation against a cut off score of 68%. SICPA's financial bid was opened on 30<sup>th</sup> September, 2011 and the financial proposal was for Euros 6,696,900 per annum or Euros 20,090,700 for three years.
4. The procurement was terminated as the quoted bids were higher than the budgeted amount of Kshs. 240 million.

**Second Tender**

5. After termination of the procurement proceedings, the procuring entity initiated another procurement process for Printing, Supply and Delivery of Security Revenue Stamps complete with Tracking and Trace System and Integrated Production Accounting System.
6. An international tender No./KRA/ICB-037/2011-2012 for Printing, Supply and Delivery of Security Revenue Stamps complete with Tracking and Trace System and Integrated Production Accounting System was advertised on 30<sup>th</sup> March, 2012 and closed on 30<sup>th</sup> May, 2012. It attracted seven (7) bidders:
  - a. Edaps Consortium - Ukraine

- b. Holistik India Ltd. - India
  - c. Security Printing Press - India
  - d. De La Rue Currency and Security Print - Kenya
  - e. Madras Security Printers Ltd - India
  - f. Authentic Inc. - USA
  - g. SICPA Security Solutions SA - Switzerland
7. The evaluation committee recommended the award of the tender to SICPA Security Solutions SA at a total of Euro 42,471,464 or Kshs. 4,552,516,226 for five years at an exchange rate of Kshs. 107.19 to 1 Euro.
  8. In its meeting held on 26<sup>th</sup> November, 2012, the tender committee awarded SICPA Security Solutions SA the tender for Supply and Delivery of Security Revenue Stamps complete with Tracking and Trace System and Integrated Production Accounting System at a total of Euro 42,471,464 or Kshs. 4,552,516,226 for five years at an exchange rate of Kshs. 107.19 to 1 Euro.
  9. Kenya Revenue Authority and SICPA Security Solutions SA entered into a contract on 18<sup>th</sup> April, 2013 at a total cost of Euro 42,471,464 for a period of five years up to March 2019. The contract covered Printing, Supply and Delivery of Security Revenue Stamps for a period of five (5) years as follows:
    - i. Provision of 3,556,200,000 Security Printed Revenue Stamps for a period of five (5) years at a total cost of Euros 20,341,464 (Module 1).
    - ii. Provision of Track and race Software Solution for a period of five (5) years at a total cost of Euros. 10,450,000 (Module 1).
    - iii. Provision of Integrated Production Accounting System for a period of five (5) years at a total cost of Euros 11,680,000 (Module 2).
  10. The contract covered three products namely tobacco, wines and spirits. The total estimated number of stamps was 3.55 billion.

#### **Direct Procurement**

11. In June 2013, Legal Notice No. 110 of 18<sup>th</sup> June, 2013 required more products to be fixed with revenue stamps. The total estimated stamp consumption was revised to an estimate of 12.8 billion. The procurement through direct negotiation was initiated in January 2015 through negotiation with a view to expanding the scope of the contract dated 18<sup>th</sup> April, 2013 which was awarded to SICPA Security Solutions SA.
12. KRA's justification for using direct procurement was that the same software platform procured from SICPA Security Solutions in 2013 would be used to verify the authenticity of additional excisable products as per LN No. 110. The software had proprietary features developed by SICPA and was therefore unrealistic to envisage procurement of another software since it would not be compatible with the existing software platform.
13. KRA further stated that since SICPA had been contracted to provide the service for five (5) years, procuring another service provider to cater for the additional products introduced by the Customs and Excise (Excisable Goods Management

- System) Regulations, 2013, was not feasible. The Regulations expanded the scope of the system to cover all excisable goods except motor vehicles.
14. KRA also stated that there was no reasonable alternative that would have provided a solution compatible with the existing EGMS. Further, an alternative provider would have compelled business enterprises to install parallel EGMS facilities.
  15. Another justification given by KRA was that previous tendering process had yielded one suitable service provider (SICPA).
  16. The final justification given by KRA was that the previous contract could not be amended to include the new products as it would have gone beyond allowable limit of 25% contract variation.

### Negotiation

17. The negotiation committee held negotiations with SICPA Security Solutions SA between 7<sup>th</sup> and 15<sup>th</sup> January, 2015. The purpose of negotiations was among other things, to extend the scope of the contract for Printing, Supply and Delivery of Security Revenue Stamps complete with track and trace system and integrated production system.
18. SICPA submitted its first proposal on 1<sup>st</sup> November, 2013 which among other things offered a price of Euro 13.61 per 1000 stamps excluding VA. This proposal was not competitive as per KRA's team point of view.
19. SICPA was requested to submit another proposal with a discount based on the additional business arising from the expanded scope of EGMS. SICPA submitted a revised proposal on 15<sup>th</sup> January, 2015 which among other things reduced the price to Euro 13.25 per 1000 stamps.
20. In its meeting held on 15<sup>th</sup> May, 2015 the tender committee awarded the subject tender to SICPA Security SA at a minimum estimated cost of Euro. 158,213,898 which was equivalent to Kshs. 15,909,293,482 for a period of five years (Euro 13.25 per 1000 stamps).

### Notification and Acceptance of the Award

21. The award of the tender was communicated to SICPA Security Solutions SA vide letter Ref:KRA/HQS/DP/423/2014-2015 of July 17<sup>th</sup> 2015. The award was for a period of five years (2015/16 to 2019/20) at Euro 13.25 per 1000 stamps exclusive of VAT. The notification letter also informed them that it served as the intention of the procuring entity.. *"to terminate the existing contract between us entered into on 18<sup>th</sup> April 2013.."*
22. SICPA accepted the offer vide their letter dated 30<sup>th</sup> July 2015. They also concurred with the intention of KRA to terminate the previous contract dated 18<sup>th</sup> April 2013.
23. KRA and SICPA entered into contract dated 30<sup>th</sup> October, 2015. The contract was for five (5) years at Euros 13.25 per 1000 stamps excluding VAT. The estimated total cost was Euros 15,909,293,482.

24. The contract dated 18<sup>th</sup> April 2013 was terminated vide letter Ref: KRA/HQS/ICB/037/2011-12 of 15<sup>th</sup> September, 2015. The effective date of termination was 30<sup>th</sup> September, 2015.

#### Choice of a tendering method and reporting requirements

25. The subject procurement was processed under the ambit of the repealed Public Procurement and Disposal Act (2005) and its attendant legislations. Under the Act, the choice of the procurement methods and management of the procurement proceedings were at the discretion of the procuring entities. Open tender was the preferred method of procurement but entities were allowed to use alternative procurement methods as long as they met the conditions set out by the Act for each procurement method.

26. However, entities are expected to submit reports on procurement activities when they are due. Towards this end, KRA submitted to the Authority the report on the use of direct procurement method for the subject procurement in accordance with Regulation 63 (2) of the Public Procurement and Disposal Regulations, 2006.

#### PPRA's Opinion on Adherence to the Law by KRA

27. Based on the documents availed by KRA, the procurement was processed through direct procurement method as guided by Section 29 (2) and (3), 74 (2) and 75 of the Act.

28. A review of the procurement records availed by KRA shows that the approval of the direct procurement method was done by the tender committee in its meeting held on 4<sup>th</sup> February, 2015 whereas negotiations between 7<sup>th</sup> and 15<sup>th</sup> January, 2015. This is contrary to Section 29 (3) of the Public Procurement and Disposal Act (2005) which provides that:

*Section 29 (3) 'A procuring entity may use restricted tendering or direct procurement as an alternative procurement procedure only if, before using that procedure, the procuring entity:*

*...(b) obtains the written approval of its tender committee; and*

*c) records in writing the reasons for using the alternative procurement procedure.*

In this case, the negotiations between SICPA and KRA preceded the approval by the tender committee.

29. The award of the tender was made by the tender committee during its meeting held on 4<sup>th</sup> February, 2015. It was not clear how the same award was made by the tender committee in a meeting held on 15<sup>th</sup> May, 2015.

30. In the view of PPRA, KRA engaging SICPA Security Solutions SA for the extra scope of the assignment was a reasonable option based on the fact that the

bidder had installed software for verification of stamps which had proprietary features.

### Committee Resolutions

The Committee made the following resolution:

1. That the Authority reviews the subject contract and provide information on when the contract begins and ends.

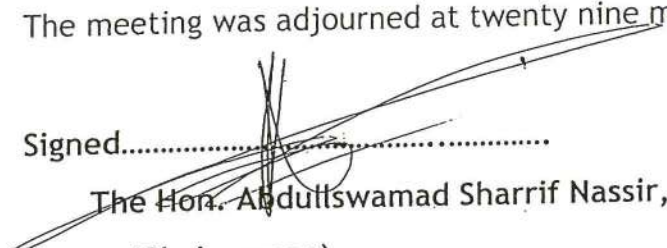
MIN/PIC/397/2018: ANY OTHER BUSINESS

No other business arose.

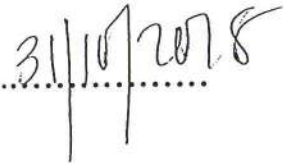
MIN/PIC/398/2018: ADJOURNMENT

The meeting was adjourned at twenty nine minutes past one O'clock.

Signed.....

  
The Hon. Abdullswamad Sharrif Nassir, MP  
(Chairperson)

Date.....





MINUTES OF THE 66<sup>TH</sup> SITTING OF THE PUBLIC INVESTMENTS COMMITTEE HELD ON THURSDAY, 9<sup>TH</sup> AUGUST 2018 IN ROOM 7, MAIN PARLIAMENT BUILDINGS AT 10.00 A.M.

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**PRESENT**

1. The Hon. Abdullswamad Sharrif Nassir, MP (Chairman)
2. The Hon. John Muchiri Nyaga, M.P
3. The Hon. Raphael Bitta Sauti Wanjala, MP
4. The Hon. Omar Mohamed Maalim Hassan, MP
5. The Hon. Nicholas Scott Tindi Mwale, MP
6. The Hon. Mohamed Hire Garane, M.P.
7. The Hon. Joash Nyamache Nyamoko, MP
8. The Hon. Paul Kahindi Katana, MP

**ABSENT WITH APOLOGY**

1. The Hon. Ahmed Abdisalan Ibrahim, MP (Vice chairman)
2. The Hon. Mary Wamaua Waithira Njoroge, MP
3. The Hon. Chrisantus Wamalwa Wakhungu, MP
4. The Hon. Purity Wangui Ngirici, MP
5. The Hon. Rashid Kassim Amin, MP
6. The Hon. (Prof.) Mohamud Sheikh Mohammed, MP
7. The Hon. Ahmed Kolosh Mohamed, MP
8. The Hon. Gideon Mutemi Mulyungi, MP
9. The Hon. James Kamau Githua Wamacukuru, M.P
10. The Hon. Thuku Zachary Kwenya, M.P
11. The Hon. Babu Owino Paul Ongili, MP

**IN ATTENDANCE**

**NATIONAL ASSEMBLY SECRETARIAT**

- |                        |   |                         |
|------------------------|---|-------------------------|
| 1. Mr. Mohamed Boru    | - | Clerk Assistant II      |
| 2. Mr. Charles Atamba  | - | Research Officer        |
| 3. Ms. Mugure Gituto   | - | Legal Counsel           |
| 4. Mr. Thomas Ogwel    | - | Fiscal Analyst          |
| 5. Ms. Noel Chelagat   | - | Media Relations Officer |
| 6. Ms. Christine Maeri | - | Audio Recording Officer |

**IN ATTENDANCE**

- |                             |   |                        |
|-----------------------------|---|------------------------|
| 1. Mr. Charles Nyanyuki     | - | Director, Audit        |
| 2. Mr. George Otieno Nashon | - | Deputy Director, Audit |
| 3. Ms. Evelyn Kauna         | - | Manager, Audit         |

**MIN/PIC/325/2018: PRELIMINARIES**

The Chairperson called the meeting to order at twenty seven minutes past ten O'clock

followed by a word of prayer and introductions.

**MIN/PIC/326/2018: EVIDENCE BY THE CENTRE FOR MATHEMATICS, SCIENCE AND TECHNOLOGY EDUCATION IN AFRICA (CEMESTEA)**

Mr. Stephen Njoroge, the Director of the Centre For Mathematics, Science And Technology Education In Africa accompanied by Ms. Sarah Mwaniki (Accountant), Mr. George Kiria (Training Coordinator, Primary Programme), Mr. Patrick Logolla (Training Coordinator, Special Programmes), Mr. Makanda John (Training Coordinator, Primary Programme) and Ms. Mary Sichangi (Training Coordinator, Linkages and International Training appeared before the Committee to adduce evidence on the report of the Auditor General on the financial statements of the Center for the financial year 2015/16 to financial year 2016/2017.

**MIN/PIC/327/2018: EXAMINATION OF AUDITED ACCOUNTS OF CEMESTEA FOR THE FY 2015/16**

The Committee heard that the Center's accounts for the financial year 2015/2016 was unqualified.

**MIN/PIC/328/2018: EXAMINATION OF AUDITED ACCOUNTS OF CEMESTEA FOR THE FY 2016/17**

The Committee heard that the Center's account for the financial year 2015/2016 was unqualified.

**MIN/PIC/329/2018: ANY OTHER BUSINESS**

The Committee heard that the CEMESTEA had not had a fully constituted Board of Directors for the last two years. There had been plans to merge the Center with other government training agencies so a decision was made to have one Board for the merged institutions. The merger had not yet taken place.

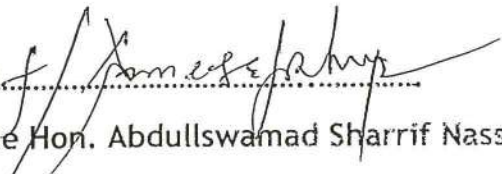
**Committee Resolution**

The Center was asked to write to the parent Ministry and update the latter on the lack of a fully constituted Board.

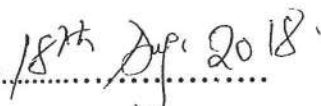
**MIN/PIC/330/2018: ADJOURNMENT**

The meeting was adjourned at ten minutes to eleven O'clock.

Signed.....

  
The Hon. Abdullswamad Sharrif Nassir, MP  
(Chairperson)

Date.....

  
18<sup>th</sup> Dec 2018

MINUTES OF THE 65<sup>TH</sup> SITTING OF THE PUBLIC INVESTMENTS COMMITTEE HELD ON WEDNESDAY, 8<sup>TH</sup> AUGUST, 2018 IN ROOM 7, MAIN PARLIAMENT BUILDINGS AT 3:00 PM.

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**PRESENT**

1. The Hon. Abdullswamad Sharrif Nassir, MP (Chairman)
2. The Hon. John Muchiri Nyaga, M.P
3. The Hon. Raphael Bitta Sauti Wanjala, MP
4. The Hon. Mary Wamaua Waithira Njoroge, MP
5. The Hon. Paul Kahindi Katana, MP
6. The Hon. Joash Nyamache Nyamoko, MP
7. The Hon. Mohamed Hire Garane, M.P
8. The Hon. Nicholas Scott Tindi Mwale, MP
9. The Hon. Omar Mohamed Maalim Hassan, MP

**ABSENT WITH APOLOGY**

1. The The Hon. Ahmed Abdisalan Ibrahim, MP (Vice chairman)
2. The Hon. Chrisantus Wamalwa Wakhungu, MP
3. The Hon. Thuku Zachary Kwenya, M.P
4. The Hon. Rashid Kassim Amin, MP
5. The Hon. (Prof.) Mohamud Sheikh Mohammed, MP
6. The Hon. Purity Wangui Ngirici, MP
7. The Hon. James Kamau Githua Wamacukuru, M.P
8. The Hon. Babu Owino Paul Ongili, MP
9. The Hon. Gideon Mutemi Mulyungi, MP
10. The Hon. Ahmed Kolosh Mohamed, MP

**IN ATTENDANCE**

**NATIONAL ASSEMBLY SECRETARIAT**

- |                        |   |                         |
|------------------------|---|-------------------------|
| 1. Mr. Mohamed Boru    | - | Third Clerk Assistant   |
| 2. Ms. Mugure Gituto   | - | Legal Counsel           |
| 3. Mr. Charles Atamba  | - | Researcher              |
| 4. Mr. Thomas Ogwel    | - | Fiscal Analyst          |
| 5. Ms. Noelle Chelagat | - | Media Relations Officer |
| 6. Ms. Winfred Atieno  | - | Audio Recording Officer |

**MIN/PIC/321/2018: PRELIMINARIES**

The Chairperson called the meeting to order at three minutes past three O'clock.

**MIN/PIC/322/2018: SUBMISSION FROM THE KENYA BUREAU OF STANDARDS**

The Committee heard that the Ag. Managing Director of the Kenya Bureau of Standards was unavailable and had sent apologies. The Committee resolved to re-invite the Bureau to appear before it on Wednesday 15<sup>th</sup> August, 2018 at 3.00pm.

MIN/PIC/323/2018:

ANY OTHER BUSINESS

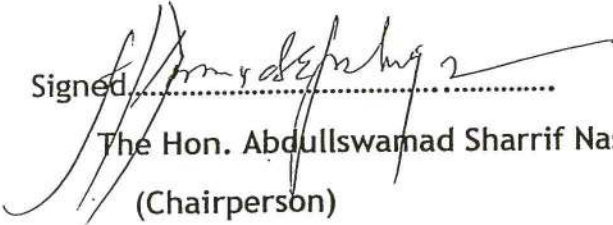
No other business arose.

MIN/PIC/324/2018:

ADJOURNMENT

The meeting was adjourned at twelve minutes past three O'clock.

Signed.....

  
The Hon. Abdullswamad Sharrif Nassir, MP  
(Chairperson)

Date.....

18<sup>th</sup> Aug, 2018

MINUTES OF THE 64<sup>TH</sup> SITTING OF THE PUBLIC INVESTMENTS COMMITTEE HELD ON WEDNESDAY, 8<sup>TH</sup> AUGUST, 2018 IN ROOM 7, MAIN PARLIAMENT BUILDINGS AT 11:00 AM.

---

**PRESENT**

1. The Hon. Abdullswamad Sharrif Nassir, MP (Chairman)
2. The Hon. John Muchiri Nyaga, M.P
3. The Hon. Raphael Bitta Sauti Wanjala, MP
4. The Hon. Gideon Mutemi Mulyungi, MP
5. The Hon. Mary Wamaua Waithira Njoroge, MP
6. The Hon. Joash Nyamache Nyamoko, MP
7. The Hon. Babu Owino Paul Ongili, MP
8. The Hon. Rashid Kassim Amin, MP

**ABSENT WITH APOLOGY**

1. The Hon. Ahmed Abdisalan Ibrahim, MP (Vice chairman)
2. The Hon. Chrisantus Wamalwa Wakhungu, MP
3. The Hon. Omar Mohamed Maalim Hassan, MP
4. The Hon. Thuku Zachary Kwenya, M.P
5. The Hon. Mohamed Hire Garane, M.P
6. The Hon. (Prof.) Mohamud Sheikh Mohammed, MP
7. The Hon. Purity Wangui Ngirici, MP
8. The Hon. Nicholas Scott Tindi Mwale, MP
9. The Hon. James Kamau Githua Wamacukuru, M.P
10. The Hon. Ahmed Kolosh Mohamed, MP
11. The Hon. Paul Kahindi Katana, MP

**IN ATTENDANCE**

**NATIONAL ASSEMBLY SECRETARIAT**

- |                        |   |                         |
|------------------------|---|-------------------------|
| 1. Mr. Mohamed Boru    | - | Third Clerk Assistant   |
| 2. Ms. Mugure Gituto   | - | Legal Counsel           |
| 3. Mr. Charles Atamba  | - | Researcher              |
| 4. Mr. Thomas Oghwell  | - | Fiscal Analyst          |
| 5. Ms. Noelle Chelagat | - | Media Relations Officer |
| 6. Ms. Christine Maeri | - | Audio Recording Officer |

**IN ATTENDANCE**

- |                            |   |                         |
|----------------------------|---|-------------------------|
| 1. The Hon. Joshua Kuttuny | - | Friend of the Committee |
|----------------------------|---|-------------------------|

**IN ATTENDANCE**

- |                             |   |                        |
|-----------------------------|---|------------------------|
| 1. Mr. George Otieno Nashon | - | Deputy Director, Audit |
| 2. Dr. Sammy Kimungunyi     | - | Manager, Audit         |

MIN/PIC/316/2018: PRELIMINARIES

The Chairperson called the meeting to order at twenty three minutes past eleven O'clock.

MIN/PIC/317/2018: EVIDENCE BY THE KENYA ASSOCIATION OF MANUFACTURERS (KAM)

Mr. Kimani Rugembo, the Kenya Association of Manufacturers Chairperson, accompanied by Mr. Muchai Kuniya (Vice Chairman, KAM), Mr. Job Wanjohi (Head of Policy), Mr. Ishmael Bett (CEO, Kenya Association of Suppliers), Ms. Victoria Kaigai (Government Affairs Manager, BAT), Mr. Salman Sudaib (Chief Finance Officer, L'Oreal), Mr. Bharat Shah (Kenafri), Ms. Grace Mbiu (L'Oreal), Mr. Hasmukh Shah (KAM), Mr. Anup Bid (KAM) and Ms. Miriam Bonett (KAM) appeared before the Committee to adduce evidence on the implementation of the Excise Goods Management System.

MIN/PIC/318/2018: BRIEF BY THE KENYA ASSOCIATION OF MANUFACTURERS ON THE EXCISE GOODS MANAGEMENT SYSTEM

1. The Government of Kenya introduced the Excisable Goods Management System (EGMS) in Kenya in 2013. The purpose was to;
  - Deter counterfeiting
  - Facilitate tracking
  - Enable accounting for the production of excisable goods, and
  - Facilitate authentication of excisable goods and the stamps.
2. The Customs and Excise (EGMS) Regulations, 2013 introduced the provisions on EGMS which required all excisable goods except motor vehicles to be affixed with excise stamps. The implementation of the same commenced with the Tobacco and Alcohol manufacturing sectors.
3. In March 2017, the National Treasury published in the Gazette Regulations known as the *Excise Duty (Excisable Goods Management System) Regulations of 2017 (Legal Notice No. 53)*. The Regulations revoked the 2013 Regulations.
4. The 2017 Regulations provides that the EGMS System comprises of excise stamps, a track and trace system, production accounting system and related software and hardware. The EGMS Stamps can be either a digital stamp, paper stamp or a mark that the Kenya Revenue Commissioner may approve to be affixed or printed on excisable goods.
5. The Kenya Association of Manufacturers appeared before this Committee in 2016 to address concerns on the EGMS system. (Submissions on the same as Annex 1).

A. CHALLENGES FACED BY MANUFACTURERS IN THE IMPLEMENTATION OF THE ELECTRONIC GOODS MANAGEMENT SYSTEM (EGMS)

6. The main challenges that are currently faced by the manufacturers on the proposed EGMS and its implementation are;

(i) Cost of the stamp

(ii) Equipment installation and operations

Cost of the Stamp

7. The cost of the stamp for each category of goods, has been set out in the Excise Duty (Excisable Goods Management System) Regulations of 2017. The stamp is additional to the Excise Duty tax payable under the Excise Act. This therefore amounts to double taxation.

8. The cost of the stamp stated in the Regulations consists of the cost of the ink and stamps. The cost proposed cannot justify the cost of stamp as manufacturers tend to print batch numbers and the cost of ink for coding or for stamps is nowhere near the above mentioned costs. Manufacturers should therefore not have to pay in any way for the system to be introduced.

Table 1 below shows an international Comparisons of stamp fees and clearly shows that Unit price is highest in Kenya.

Table 1: International Comparisons of Stamp Fees

Product	In Local Currency Unit				at April 7th USD/LCU			
	Kenya (KES)	Brazil (BRL)	Georgia (GEL)	Morocco (MAD)	Kenya (USD)	Brazil (USD)	Georgia (USD)	Morocco (USD)
Water	1.500	0.030	0.010	0.010	0.015	0.008	0.004	0.001
Sodas	1.500	0.030	0.012	0.030	0.015	0.008	0.005	0.003
Beer	1.500	0.030	na	0.200	0.015	0.008	na	0.021
Cigarettes	1.500	0.050	Na	0.500	0.015	0.014	na	0.052

9. KAM estimates that the country has an installed bottling capacity in excess of 500,000 bottles an hour which translates to 12 million a day (360 million a month) \* 4.32 billion a year (assuming 100 % capacity utilisation). The estimated actual cost of a stamp is about 7 cents which when multiplied with the production capacity cost is equivalent to 3.024 billion whereas collecting revenue from the proposed stamp duty of 60 cent will equate to Ksh. 25.9 billion. There is cost disadvantage for manufacturers to a tune of Ksh. 22.88 billion hence the

implementation is not revenue neutral. Table 2 provides a detailed breakdown of the costs:

**Table 2: Breakdown of estimated costs of the stamps**

		Bottles produced per year (billion)	Total (billion)
Estimated cost of a stamp	7 cents	4.32	3.02
Proposed cost of the stamp (Proposed beverage cost of stamp)	60 cents	4.32	25.90
Difference between the actual and estimated cost of a stamp			22.88

#### Anticipated effects of the cost of stamp duty to manufacturers

10. The following are the anticipated effects of the cost of stamp duty:

- (a) Manufacturers anticipate that the costs related to EGMS will eventually be borne by the consumers to meet the cost of production and the additional costs.
- (b) Inflation adjustment assessed annually also increases the amount of excise tax. This increases inflationary pressure in the country. With the high inflationary cost of living, the common mwanaichi will be affected in this price sensitive economy.
- (c) The proposed costs will render manufacturers to be uncompetitive as this an additional cost.
- (d) The sales volumes will be affected and it will also lead to quantum losses for the manufacturing companies.
- (e) A large share of excisable products are low margin products and sensitive to price increases.

#### Equipment installation and operational costs of the system

11. **Issues relating to additional investment of drying/blowers equipment/Capital outlays:** Manufacturers have to bear certain capital outlays related to the installation of the system. Examples of this include, blowers to dry parts of products such as the bottle caps before they can be coded, new reject lines for each EGMS machine installed, server rooms, fibre optic cabling, software and hardware synchronization among others.

Sweating /steam/heat affect the printing/coding as the bottle cap area has to be completely dry. Water affects the coding so manufacturers have to ensure the



surface is dry and use a blow dryer before coding. This necessitates the installation of a blower to dry the caps before they can be coded.

12. **Policy issues on Overall Equipment Efficiency (OEE) guarantees:** When installing and making adjustments to accommodate the EGMS system, some manufacturers require to have experts (OEMs) to be present during the installation on the lines. This is as per their machinery policy warranty and guarantees for their manufacturing equipment to avoid withdrawal of warranty offers. Average industry estimates the cost of getting the OEMs to be present will cost about 150,000 Euros per line which is beyond the cost of most manufacturers.
13. **Excise stamps on cosmetics and beauty products (Products packaged in small packs/Odd shaped product packages):** Certain cosmetics products are very small in shape and size and it is physically and practically impossible to paste manual stamps or digital stamps on them. Some cosmetics products also have odd shapes that restrict fixation of the stamps.
14. **Issues relating to printing, size of caps, embossed caps, sports caps and the ink colours affecting the dark coloured caps and tetra packs:** Printing on sports caps will not be practical and the ink will not be fit for human consumption when the cap touches the opening part of the packaging. There is no flexibility on the printer and the diameter of the print especially for smaller diameter caps with tamper proof seals such as the mineral water bottles.  
  
Different manufacturers have unique challenges as far as embossing, design and colour of the caps and tetra packs and therefore this problem requires a complete overhaul of product design which in many cases is not possible due to the inherent design of the packaging of the product.
15. **Issues related to the location of the print:** The EGMS system is not designed to alter the location of the printing to the side of the bottle but instead it is designed to print on top of the caps or tetra packs as manufacturers have different machines where some print on the side. With the KEBS standardization mark affixed, the stamp may overlap with the new stamps.
16. **Issues related to Intellectual Property Rights (IPR):** Printing on trademarks and embossing is impossible on the current EGMS equipment and also making any changes on the goods. An example on this is bottle caps.
17. **Treatment of goods for exports on demand:** Many manufacturers do not have a separate assembly line for production of export goods only. Goods made for home consumption require to be affixed with stamps while goods for exports do not.  
  
The EGMS machine has an export mode which allows switching on when goods for export are being produced, certain exceptions apply which make it difficult to use this mode. There are instances where goods are produced and the order is cancelled. This situation would present challenges for manufacturers in relation to

exports if they need to be returned back to the market. This implies that goods originally produced for export will need to be reworked into the system and coded for local consumption which is not possible since, the EGMS equipment is integrated in the production line.

18. **Issues related to rework on products that are non-compliant to the Quality Assurance (QA) policy:** There are instances where manufacturers have problems with the labels such as bad expiry dates that need to be reworked and brought back to the assembly line. However with the new system, manufacturers are concerned with the effect of the coding of reworks after goods are produced and how will the line deal with in-house and market rejects.
19. **Issues related to small floor spaces and physical hindrances to expansion of the floor space and in rented warehouses:** Some manufacturers do not have the space to accommodate the EGMS equipment as it is not physically possible for them to remove their existing machines. The space and the physical layout of most factories is a constraint.
20. **Duplicity of inter-agency marks:** The system will add to the country's multiplicity of marks affixed on products. This is as opposed to moving towards the global goals of having a single application platform. The single system will also assist in dealing with counterfeits in the market and contra banded products. In Kenya, there are now a number of marks and codes that have to be affixed on a product. They include, Excise duty, KEBS standardization mark, Bar Codes, Product information, Responsible waste disposal, Product certifications.

#### **Anticipated effects to manufacturers on equipment and installation of the system and operational costs**

- (a) Manufacturers anticipate that the installation process and costs will affect the lead times and will also add on to the cost of installation.
- (b) In addition, loss of sales is expected due to the EGMS occasioned by, frequent breakdowns of the system and also due to the rejection of goods from the production line when they are not properly coded which contributes to 1.5% of production downtime.

#### **B. MANUFACTURERS EXPERIENCES IN IMPLEMENTING THE EGMS UNDER THE 2013 REGULATIONS**

21. Cost of installing the EGMS is significant. Sectors such as the alcohol have estimated to have spent more than 400 million to implement the System in terms of application and coding equipment, line adjustments and additional system networking.

22. The cost of excise stamps has continued to increase arbitrarily. Examples of this are on cigarette products which were discriminately increased from Kshs 1.50 to Kshs. 2.80. This amounted to an increase of 87%, an unprecedented and unexpected cost to the business.
23. The cost of excise stamp has been disproportionately apportioned to different products with no justification. The cost of the stamp should remain the same and applied on all products excisable and stamped goods. An example is the cost of stamp varies between KES. 0.5 to 2.8 for different products.
24. The recent installation of the system has evidenced emerging costs related to retrofitting the production line to accommodate new the system. KRA is only providing the cost of the machine.
25. The system of stamp affixing in Kenya faces a myriad of challenges. A good example is with the standardization mark which has been in implementation for a longer period. Recent reports indicate that the stamps have been counterfeited. Below please see an excerpt from a leading daily newspaper reporting the same;

*“Interestingly, some imported products impounded from retail outlets and distribution points had affixed the KEBs Diamond Mark of Quality stamps, confirming deeply rooted graft. KEBs has since launched investigations into the breach of the stamps and has promised to issue a public report soon.”<sup>1</sup>*

#### C. CONSULTATIONS WITH RELEVANT GOVERNMENT AGENCIES

26. KAM has raised all these concerns above with the National Treasury and the Kenya Revenue Authority. A joint status Report was developed between KAM and KRA which is enclosed as **Annex 2 of this Memorandum**. To date the following key issues remain outstanding:
  - (i) Cost issues: KAM had proposed that the cost of the EGMS to be covered by the excise tax payable so that the system costs do not burden to manufacturers or cost passed on to consumers.
  - (ii) Exports: KAM had requested for KRA to address exports challenges arising from exports of goods. The agreement was for further consultations to be held.
  - (iii) Scheduled individual company visits: Due to the unique challenges of each company, KAM had proposed for site visits to customise solutions and guidelines.
  - (iv) Implementation date of EGMS: the date was to be jointly agreed between KAM and KRA.

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<sup>1</sup> <https://www.nation.co.ke/business/State-agencies-under-scrutiny-over-fake-goods/996-4628362-qn7410z/index.html> (Sunday Nation, Sunday June, 24 2018)

#### **D. KAM WAY FORWARD AND RECOMMENDATIONS**

In light of the foregoing, KAM proposes the following:

- 1. Gazettement of the suspension by the National Assembly of the Regulations No. 53 of 2017 to allow for further and productive consultation.**
- 2. Wider public stakeholder engagements**

The Cabinet Secretary of the National Treasury and the Kenya Revenue Authority to go back to the drawing board and extensively and comprehensively consult all affected stakeholders. This is with the purpose of developing solutions that are acceptable to all stakeholders including manufacturers. The Report on such consultations be presented to Parliament for review in the interest of citizens.

- 3. Cost of the system and stamp**

The system should not impose any financial burden to manufacturers and increase costs. This is necessary to ensure the Sector remains competitive both regionally and globally. In addition, the Sector is already paying high excise tax that is subject to increases regular and inflationary adjustments.

In the alternative, for any extra cost incurred by the manufacturer arising from the implementation of the system, the cost can be offset against the payable excise taxes.

- 4. A verification audit before implementation of the system**

Parliament and relevant government agencies who include, National Treasury and Kenya Revenue Authority should conduct a verification audit on the status of implementation and concerns raised by stakeholders. The recent suspension by the National Assembly and the extension of the implementation date by Kenya Revenue Authority attests to the fact that there are concerns that are yet to be resolved in the country.

#### **Committee Observations**

The Committee made the following resolutions:

1. The cost of excise stamps has increased for some products with the introduction of Legal Notice No. 53 of 2017. Examples of this are on cigarette products which were increased from Kshs 1.50 to Kshs. 2.80. This amounted to an increase of approximately 87%.
2. The cost of the stamp stated in the Regulations consists of the cost of the ink and stamps. The cost proposed cannot justify the cost of the stamp as manufacturers tend to print batch numbers and the cost of ink for coding or for stamps is not as high as the proposed cost.

3. The cost of excise stamp has been disproportionately apportioned to different products. The 2013 Regulations had set a blanket stamp fee of Kshs. 1.50 but no explanation given for the variation in stamp price in the 2017 Regulations.
4. There had been a drop in the amount of Excise tax collected for some categories of Excisable goods since the introduction of the EGMS. This goes against the stated objective of introducing the system which intended to increase government revenue in the form of Excise tax collected.
5. The amount collected from affixed stamps does not go to the Consolidated Fund but serves as revenue for SICPA SA.
6. The proposed costs will render manufacturers to be uncompetitive as this an additional cost. The cost of installing the EGMS is significant. Sectors such as the alcohol have estimated to have spent more than 400 million to implement the System in terms of application and coding equipment, line adjustments and additional system networking.
7. Certain cosmetics products are very small in shape and size and it is physically and practically impossible to paste manual stamps or digital stamps on them.
8. Printing on trademarks and embossing is impossible on the current EGMS equipment and also making any changes on the goods. An example on this is bottle caps.
9. Many manufacturers do not have a separate assembly line for production of export goods only. Goods made for home consumption require to be affixed with stamps while goods for exports do not. This necessitates having separate production lines which is an additional cost to manufacturers.
10. Reports indicate that the stamps have been counterfeited which negates one of the main reasons for introducing the stamps.
11. Manufacturers reported that SICPA Kenya has been hiring staff from the companies where they offer EGMS support service which is tantamount to industrial espionage.

### **Committee Resolutions**

**The Committee made the following resolutions:**

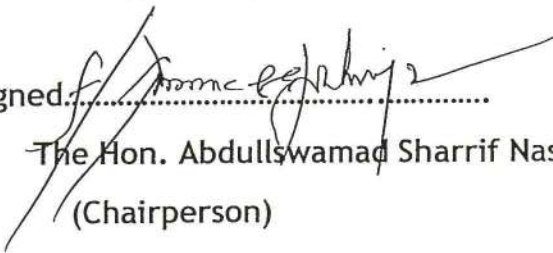
1. The Committee would seek information from Brazilian authorities regarding SICPA's work in the country and any corruption allegations or charges levelled against the company.
2. The Authority was asked to provide tender documents for the different tender processes on procurement of the EGMS system.
3. The Authority was further asked to submit any due diligence report they may have conducted before procuring the system.

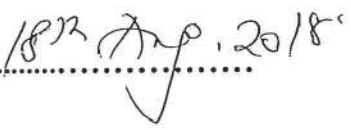
**MIN/PIC/319/2018: ANY OTHER BUSINESS**

No other business arose

**MIN/PIC/320/2018: ADJOURNMENT**

The meeting was adjourned at twenty minutes to two O'clock.

Signed:   
.....  
The Hon. Abdullswamad Sharrif Nassir, MP  
(Chairperson)

Date:   
.....

MINUTES OF THE 63<sup>RD</sup> SITTING OF THE PUBLIC INVESTMENTS COMMITTEE HELD ON TUESDAY, 7<sup>TH</sup> AUGUST, 2018 IN ROOM 7, MAIN PARLIAMENT BUILDINGS AT 11:00 AM.

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**PRESENT**

1. The Hon. Abdullswamad Sharrif Nassir, MP (Chairman)
2. The Hon. John Muchiri Nyaga, M.P
3. The Hon. Raphael Bitta Sauti Wanjala, MP
4. The Hon. Paul Kahindi Katana, MP
5. The Hon. (Prof.) Mohamud Sheikh Mohammed, MP
6. The Hon. Purity Wangui Ngirici, MP
7. The Hon. Rashid Kassim Amin, MP
8. The Hon. Babu Owino Paul Ongili, MP
9. The Hon. Mohamed Hire Garane, M.P

**ABSENT WITH APOLOGY**

1. The Hon. Ahmed Abdisalan Ibrahim, MP (Vice chairman)
2. The Hon. Chrisantus Wamalwa Wakhungu, MP
3. The Hon. Omar Mohamed Maalim Hassan, MP
4. The Hon. Thuku Zachary Kwenya, M.P
5. The Hon. Nicholas Scott Tindi Mwale, MP
6. The Hon. James Kamau Githua Wamacukuru, M.P
7. The Hon. Gideon Mutemi Mulyungi, MP
8. The Hon. Joash Nyamache Nyamoko, MP
9. The Hon. Ahmed Kolosh Mohamed, MP
10. The Hon. Mary Wamaua Waithira Njoroge, MP

**IN ATTENDANCE**

**NATIONAL ASSEMBLY SECRETARIAT**

- |                        |   |                         |
|------------------------|---|-------------------------|
| 1. Mr. Mohamed Boru    | - | Third Clerk Assistant   |
| 2. Ms. Mugure Gituto   | - | Legal Counsel           |
| 3. Mr. Charles Atamba  | - | Researcher              |
| 4. Mr. Thomas Oghwell  | - | Fiscal Analyst          |
| 5. Ms. Noelle Chelagat | - | Media Relations Officer |
| 6. Ms. Christine Maeri | - | Audio Recording Officer |

**IN ATTENDANCE**

- |                             |   |  |
|-----------------------------|---|--|
| 1. Mr. George Otieno Nashon | - | Deputy Director, Audit                 |
| 2. Mr. Maurice Oluyo        | - | Manager, Audit                         |
| 3. Mrs. Joyce Wesonga       | - | Deputy Inspector General, Corporations |

**MIN/PIC/311/2018: PRELIMINARIES**

The Chairperson called the meeting to order at twenty three minutes past eleven O'clock.

**MIN/PIC/312/2018: EVIDENCE BY THE KENYA REVENUE AUTHORITY (KRA)**

Mr. John Njiraini, the Commissioner General of the Kenya Revenue Authority, accompanied by Mr. Ezekiel Saina (Commissioner, Support Services), Ms. Wairimu Nganga (Commissioner LS & BC), Ms. Grace Mrichu (Deputy Commissioner, Supply Chain Management), Mr. Caxton M. Ngeywo (Deputy Commissioner), Ms. Grace Wandera (Deputy Commissioner); Mr. Waweru Gatonye (Advocate), Mr. Paul Wanga (Advocate), Mr. Muema Joseph (Chief Manager) and Ms. Beatrice Mundia (Communications Manager) appeared before the Committee to adduce evidence on the report of the Auditor General on the procurement and implementation of the Excise Goods Management System.

**MIN/PIC/313/2018: EXAMINATION OF THE FINDINGS OF THE SPECIAL AUDIT ON THE EXCISE GOODS MANAGEMENT SYSTEM**

1. The Committee was taken through the rationale and key findings of the special audit by the Auditors who undertook the exercise.
2. The Auditors stated that they did not give KRA an opportunity to respond to the audit findings since this was a forensic audit and there is no provision for issuance of a management letter as is the norm in an audit exercise.
3. The Kenya Revenue Authority decided to benchmark with Brazil before implementing the system following referral by the Inter-American Center of Tax Administrations "CIAT", an international organization specialized in training and exchanges of information between national tax administrations of which Kenya is an associate member. CIAT had initially recommended that Kenya benchmarks with Chile on implementation of iTAX which has since been implemented successfully by KRA.
4. The Authority did not seek any legal advice before the procurement and implementation of the Excise Goods Management System.
5. The Authority stated that one of the reasons for cancelling the first tender for the EGMS in 2011 was because the tender 'did not meet the specifications' of what KRA sought.
6. The EGMS system was scheduled for roll out on August 1<sup>st</sup>, 2018 before deferral. No company was given an extension of time to roll out the EGMS.
7. The Legal Notice No. 53 of 2017 spelt out the cost per stamp for the different range of excisable goods.
8. The Kenya Association of Manufacturers were onboard in terms of implementing the EGMS and even appeared in a KRA documentary on the same



Committee Resolutions

The Committee made the following resolutions:

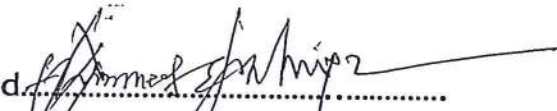
1. The Committee would seek information from Brazilian authorities regarding SICPA's work in the country and any corruption allegations or charges levelled against the company.
2. The Authority was asked to provide tender documents for the different tender processes on procurement of the EGMS system.
3. The Authority was further asked to submit any due diligence report they may have conducted before procuring the system.

MIN/PIC/314/2018: ANY OTHER BUSINESS

No other business arose

MIN/PIC/315/2018: ADJOURNMENT

The meeting was adjourned at twenty minutes to two O'clock.

Signed 

Date 18<sup>th</sup> Aug 2018

The Hon. Abdullswamad Sharrif Nassir, MP  
(Chairperson)



**MINUTES OF THE 60<sup>TH</sup> SITTING OF THE PUBLIC INVESTMENTS COMMITTEE HELD ON WEDNESDAY, 1<sup>ST</sup> AUGUST 2018 IN ROOM 7, MAIN PARLIAMENT BUILDINGS AT 10.00 A.M.**

---

**PRESENT**

1. The Hon. Abdullswamad Sharrif Nassir, MP (Chairman)
2. The Hon. Ahmed Abdisalan Ibrahim, MP (Vice chairman)
3. The Hon. Omar Mohamed Maalim Hassan, MP
4. The Hon. Ahmed Kolosh Mohamed, MP
5. The Hon. James Kamau Githua Wamacukuru, M.P
6. The Hon. John Muchiri Nyaga, M.P
7. The Hon. Raphael Bitta Sauti Wanjala, MP
8. The Hon. Rashid Kassim Amin, MP
9. The Hon. Mohamed Hire Garane, M.P.

**ABSENT WITH APOLOGY**

1. The Hon. Joash Nyamache Nyamoko, MP
2. The Hon. Paul Kahindi Katana, MP
3. The Hon. Babu Owino Paul Ongili, MP
4. The Hon. Mary Wamaua Waithira Njoroge, MP
5. The Hon. Purity Wangui Ngirici, MP
6. The Hon. Gideon Mutemi Mulyungi, MP
7. The Hon. (Prof.) Mohamud Sheikh Mohammed, MP
8. The Hon. Nicholas Scott Tindi Mwale, MP
9. The Hon. Chrisantus Wamalwa Wakhungu, MP
10. The Hon. Thuku Zachary Kwenya, M.P

**IN ATTENDANCE**

**NATIONAL ASSEMBLY SECRETARIAT**

- |                        |   |                         |
|------------------------|---|-------------------------|
| 1. Mr. Evans Oanda     | - | Clerk Assistant I       |
| 2. Mr. Mohamed Boru    | - | Clerk Assistant II      |
| 3. Mr. Charles Atamba  | - | Research Officer        |
| 4. Ms. Mugure Gituto   | - | Legal Counsel           |
| 5. Ms. Noel Chelagat   | - | Media Relations Officer |
| 6. Ms. Christine Maeri | - | Audio Recording Officer |

**IN ATTENDANCE**

- |                         |   |                |
|-------------------------|---|----------------|
| 1. Mr. Josiah Oyuko     | - | Manager, Audit |
| 2. Dr. Sammy Kimungunyi | - | Manager, Audit |

**MIN/ PIC/298/2018: PRELIMINARIES**

The Chairperson called the meeting to order at fifteen minutes past ten O'clock.

**MIN/ PIC/299/2018: BRIEF ON THE SPECIAL AUDIT FOR THE COMMITTEE ON SPECIAL AUDIT ON KRA TENDER NO. KRA/HQRS/DP-423/2014 -2015 FOR EXERCISABLE GOODS MANAGEMENT SYSTEM (EGMS)**

The Auditors briefed the Committee as follows:

### **Introduction**

1. The special audit was conducted pursuant to a request from Clerk to the National Assembly referenced KNA/PIC/CORR/2016/ 172 dated 12 October 2016. The letter required the audit to address issues detailed in **Appendix I**.
2. The special audit transformed the issues raised by the Clerk into the following Terms of Reference (TORs) : Historical Background of the EGMS; Review of Procurement process in line with PPDA 2005, and other Statutory Instrument Act 2013; Review of Legal Notice 110 of 18<sup>th</sup> June 2013 and Gazette Notice 12856 of 5<sup>th</sup> September 2013; Application of the System and Value for Money.
3. Appendix I details how the issues raised by the Clerk to the National Assembly were transformed into the above TORs.

### **Objectives of the audit**

4. The objectives of the audit were to review the project implementation process of EGMS in line with the issues raised by Clerk of the National Assembly to ascertain any irregularities and provide recommendations on action to be taken.

### **Scope of work and structure of the report**

5. The special audit reported on; historical background of EGMS; review of procurement process in line with PPDA 2005, review of the process of developing Legal Notice 110 of 18<sup>th</sup> June 2013 and Gazette Notice 12856 of 5<sup>th</sup> September 2013 and financial implication of implementing the system on cost of excisable consumer goods.

### **Key Findings**

#### **Historical Background of EGMS**

6. During the period 2003-2010, KRA relied on a manual method of affixing Excise and Revenue stamps on excisable goods that was only limited to tobacco, wines, spirits and beer. This method experienced rampant counterfeiting of stamps resulting in manufacturers under declaring volumes of their products leading to under collection of excise tax.
7. In this regard, a delegation of KRA officials visited Brazilian Inland Authority to learn the benefits of implementing a comprehensive excise stamps management system. The team established that Brazil had put in place a system known as SCORPIOS that was used for integrated control and tracking of

cigarettes production and that there was a possibility to customize the system to respond to specific challenges in the Kenyan Market.

8. We were not availed any explanation/ justification on why KRA opted to visit only Brazil and not any other Country yet several other countries such as Albania, Turkey, Philippines, Morocco, Canada and USA (California and Massachusetts States) had implemented the system.

#### Review of procurement process

9. Procurement of EGMS commenced in the year 2010 and was done at three levels.
10. The first procurement, tender number, KRA/HQS/060/2010-2011(EGMS I) commenced in August 2010 when an expression of interest was advertised by KRA. Tenders were subsequently issued in June 2011 where SICPA Security Solutions SA emerged as the only qualifying bidder.
11. The special audit established a case where the then KRA Deputy Commissioner Procurement and Supplies Services interfered with the independence of the evaluation committee by issuing a memo to the Chairman Evaluation Committee requesting a review of EOI evaluation report "*to eliminate the aspect of digital solutions*" with an aim to increase the number of potential applicants. This raises doubt on the objectivity of the evaluation report.
12. Further, the actions by the then Deputy Commissioner Procurement and Supplies Services to alter the EOI tender by eliminating the aspect of digital solutions amounted to change of substance of a tender contrary to section 59(3) of PPDA, 2005 that prohibits Procuring Entities from attempting to have the substance of a tender changed after the deadline of submitting tenders.
13. The tender was thereafter terminated in September 2011 due to budgetary limitation an indication that KRA commenced the procurement process without confirming that sufficient funds were available contrary to section 26(6) of the PPDA, 2005 that prohibits procuring entities from commencing any procurement procedure until it is satisfied that sufficient funds have been.
14. The second procurement (EGMS II) tender number KRA/HQS/ICB-037/2011-2012 commenced through International Competitive Bidding in March 2012. The tender process concluded in December 2012 with the award of the contract to SICPA Security Solution SA.
15. Consequently, KRA and SICPA Security Solution SA entered into contract for supply of Security Printed Revenue Stamps ,Track and Trace Software Solution and Integrated Production Accounting System for a period of five (years) at a contract sum of Euros 42,471,464 (Kshs.4,808,134,887).
16. On 18 June 2013, the Cabinet Secretary/National Treasury issued Legal Notice number 110 (L.N 110) that expanded the scope of items to be covered under EGMS to include all excisable goods except motor vehicles manufactured in or imported into Kenya.

17. On 15 May 2015, the KRA tender committee approved termination of the contract between KRA and SICPA Security Solution SA on the ground that the contract could not cover the extended scope of excisable goods provided for under L.N110 of 18 June 2013. Variation of the existing contract could have exceeded the twenty-five percent (25%) allowed in section 9 of the Public Procurement Amendment Regulations, 2013 (L.N 106).
18. As a results of termination of the contract, KRA initiated the third procurement (EGMS III) tender number KRA/HQS/DP/423/2014-2015 as a direct procurement involving negotiation with SICPA Security Solutions SA.
19. The negotiations sought to expand the scope of the contract awarded in December 2012 (EGMS) to include additional items introduced by the Cabinet Secretary/The National Treasury vide Legal Notice number 110 (L.N 110) of 18 June 2013. L.N. 110 of 2013 required every package of the excisable goods except motor vehicle, manufactured in or imported into the country be affixed with an excise stamp.
20. The negotiations culminated into a contract between KRA and SICPA Security Solutions SA for supply of the EGMS at a contract sum of a minimum Kshs.15,909,293,482.00 and a maximum of Kshs.17,156,333,818.00 (depending on number of orders made by KRA) for a period five (5) years.
21. The tender committee cited existence of proprietary software that had been procured under the contract dated December 2012 as a rationale for engaging in direct negotiations with SICPA Security solutions SA. Accordingly, an alternative supplier would have meant compelling manufacturers businesses to install a parallel software which could not be cost effective for the manufactures and eventually costly for consumers.

**Legal Notice 110 of 18th June 2013 and Gazette Notice 12856 of 5th September 2013**

22. On 18 June 2013, the Cabinet Secretary/National Treasury issued a Legal Notice (L.N 110) that required all excisable goods except motor vehicles manufactured in or imported into Kenya to be affixed with excise stamps.
23. On 05 September 2013, the Commissioner-General of KRA issued Gazette Notice number (GN) 12856 that prescribed the price of an excise stamp to be one shilling and fifty cents (Kshs.1.50).
24. There was no evidence that both L.N 110 and G.N 12856 were submitted by the Cabinet Secretary/ National Treasury and the Commissioner-General of KRA to the National Assembly for scrutiny contrary to section 11(1) of the Statutory Instruments Act, 2013.

**Financial implication of implementing EGMS on cost of production**

25. The special audit established that though manufacturers had incurred additional costs in installation of the EGMS, they had absorbed the costs within their profit margins instead of transferring the costs to the consumers for fear

of losing on the market share. The implementation of the EGMS therefore impacted on the cost of excisable consumer goods.

26. Among the manufactures/importers interviewed, none of them availed any evidence to indicate that the introduction of EGMS had resulted in double taxation of the manufactures/importers.

#### Value for Money

27. Value for money auditing examines whether public organizations or programs have attained effectiveness, economy and efficiency in the management of resources at their disposal.
28. The objective of establishing the EGMS was to bring in more excise tax payers to increase tax collections by KRA that had been threatened by counterfeiting of stamps and manufacturers under declaring volumes of their products.
29. A review of data from KRA established that as a results of implementation of EGMS in the year 2010, together with relevant statutory instruments introduced in 2013, there has been a general increase in amounts of excise duty collected by KRA on Cigarettes, Spirits and wines by between 12% to 43% as follows:
30. In view of the foregoing, the special audit therefore concluded that whereas the acquisition of EGMS by KRA realized effectiveness, there was no evidence to proof that the process realized efficiency and economy as measures of value for money.

#### Committee Observations

The Committee made the following observations:

1. The then KRA Deputy Commissioner Procurement and Supplies Services interfered with the independence of the evaluation committee by issuing a memo to the Chairman Evaluation Committee requesting a review of EOI evaluation report "to eliminate the aspect of digital solutions" with an aim to increase the number of potential applicants. This raises doubt on the objectivity of the evaluation report.
2. Further, the actions by the then Deputy Commissioner Procurement and Supplies Services to alter the EOI tender by eliminating the aspect of digital solutions amounted to change of substance of a tender contrary to section 59(3) of PPDA, 2005 that prohibits Procuring Entities from attempting to have the substance of a tender changed after the deadline of submitting tenders.
3. The tender was thereafter terminated in September 2011 due to budgetary limitation an indication that KRA commenced the procurement process without confirming that sufficient funds were available contrary to section 26(6) of the PPDA, 2005 that prohibits procuring entities from commencing any procurement procedure until it is satisfied that sufficient funds have been.
4. The second procurement (EGMS II) tender number KRA/HQS/ICB-037/2011-2012 commenced in March 2012 and concluded in December 2012 with the award of the contract to SICPA Security Solution SA. KRA and SICPA Security Solution SA entered into contract for supply of Security Printed Revenue Stamps, Track and

Trace Software Solution and Integrated Production Accounting System for a period of five (years) at a contract sum of Euros 42,471,464 (Kshs.4,808,134,887).

5. On 15 May 2015, the KRA tender committee approved termination of the contract between KRA and SICPA Security Solution SA on the ground that the contract could not cover the extended scope of excisable goods provided for under L.N110 of 18 June 2013. Variation of the existing contract could have exceeded the twenty-five percent (25%) allowed in section 9 of the Public Procurement Amendment Regulations, 2013 (L.N 106).
6. KRA initiated the third procurement (EGMS III) tender number KRA/HQS/DP/423/2014-2015 as a direct procurement involving negotiation with SICPA Security Solutions SA. The negotiations culminated into a contract between KRA and SICPA Security Solutions SA for supply of the EGMS at a contract sum of a minimum Kshs.15,909,293,482.00 and a maximum of Kshs.17,156,333,818.00 (depending on number of orders made by KRA) for a period five (5) years.
7. The tender committee cited existence of proprietary software that had been procured under the contract dated December 2012 as a rationale for engaging in direct negotiations with SICPA Security solutions SA.
8. On 18 June 2013, the Cabinet Secretary/National Treasury issued a Legal Notice (L.N 110) that required all excisable goods except motor vehicles manufactured in or imported into Kenya to be affixed with excise stamps. There was no evidence that both L.N 110 and G.N 12856 were submitted by the Cabinet Secretary/ National Treasury and the Commissioner-General of KRA to the National Assembly for scrutiny contrary to section 11(1) of the Statutory Instruments Act, 2013. This meant that the Legal Notice and Gazzete notice were null and void.
9. Whereas the acquisition of EGMS by KRA realized effectiveness, there was no evidence to proof that the process realized efficiency and economy as measures of value for money since the contract was single sourced hence lacked competitiveness.
10. There was no evidence that KRA had done credible due diligence before commencing the procurement process for the EGMS.
11. SICPA SA had refused to comply with the request from the Office of Auditor General to be furnished with details of stamp costs in other jurisdictions where the company operates.

**MIN/PIC/300/2018: BRIEF ON THE SPECIAL AUDIT ON UNENTERED CONTAINERS DESTINED FOR NEIGHBOURING COUNTRIES**

The Auditors informed the Committee that Terms of Reference for the special audit had been developed. The Office of the Auditor General had dispatched officers to undertake the special audit.



The auditors had sought the assistance of IT experts to audit the IT systems being used at the port in Mombasa.

The Auditors stated that the audit will be completed in December 2018.

#### Committee Resolution

The Committee resolved that the Auditors should expedite the process given the fact that the matter involves neighbouring countries who are seeking a swift resolution to determine the whereabouts of the containers.

**MIN/PIC/301/2018: ANY OTHER BUSINESS**

No other business arose.

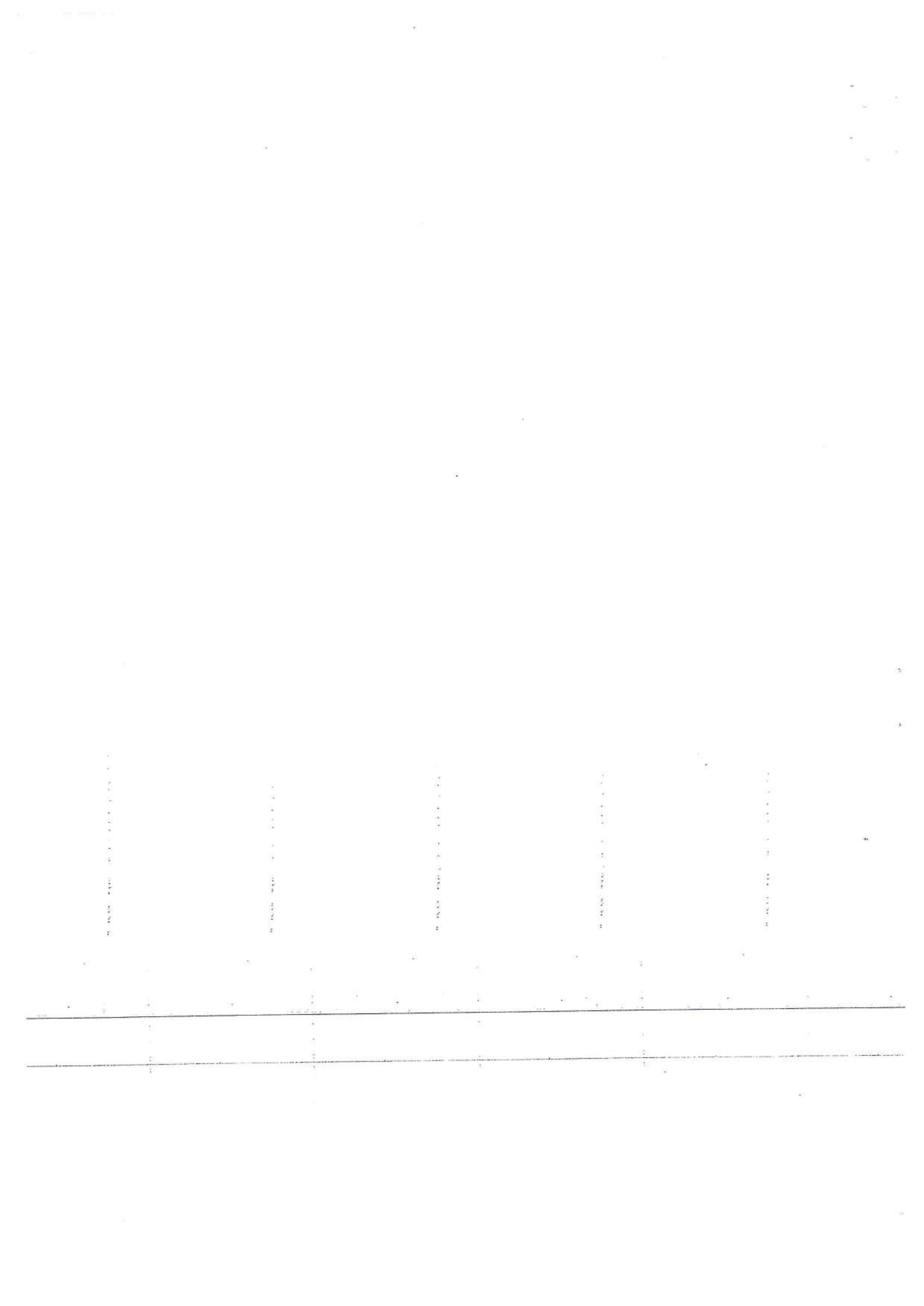
**MIN/PIC/302/2018: ADJOURNMENT**

The meeting was adjourned at five minutes to twelve O'clock.

Signed.....

Date..... 14/08/2018

The Hon. Abdullswamad Sharrif Nassir, MP  
(Chairperson)



**MINUTES OF THE 58<sup>TH</sup> SITTING OF THE PUBLIC INVESTMENTS COMMITTEE HELD ON THURSDAY, 26<sup>TH</sup> JULY 2018 IN ROOM 7, MAIN PARLIAMENT BUILDINGS AT 10:35AM**

---

**PRESENT**

1. The Hon. Abdullswamad Sharrif Nassir, MP (Chairman)
2. The Hon. James Kamau Githua Wamacukuru, M.P
3. The Hon. Chrisantus Wamalwa Wakhungu, MP
4. The Hon. Paul Kahindi Katana, MP
5. The Hon. Mohamed Hire Garane, M.P
6. The Hon. Babu Owino Paul Ongili, MP
7. The Hon. Thuku Zachary Kwenya, M.P

**ABSENT WITH APOLOGY**

1. The Hon. Ahmed Abdisalan Ibrahim, MP (Vice chairman)
2. The Hon. Joash Nyamache Nyamoko, MP
3. The Hon. Purity Wangui Ngirici, MP
4. The Hon. Nicholas Scott Tindi Mwale, MP
5. The Hon. Omar Mohamed Maalim Hassan, MP
6. The Hon. Rashid Kassim Amin, MP
7. The Hon. Mary Wamaua Waithira Njoroge, MP
8. The Hon. Ahmed Kolosh Mohamed, MP
9. The Hon. Gideon Mutemi Mulyungi, MP
10. The Hon. Raphael Bitta Sauti Wanjala, MP
11. The Hon. (Prof.) Mohamud Sheikh Mohammed, MP
12. The Hon. John Muchiri Nyaga, M.P

**IN ATTENDANCE**

**NATIONAL ASSEMBLY SECRETARIAT**

- |                        |   |                           |
|------------------------|---|---------------------------|
| 1. Mr. Evans Oanda     | - | Clerk Assistant I         |
| 2. Ms. Mugure Gituto   | - | Legal Counsel             |
| 3. Mr. Thomas Ogwel    | - | Fiscal Analyst            |
| 4. Ms. Noelle Chelagat | - | Media Relations Officer   |
| 5. Ms. Christine Maeri | - | Audio Recording Officer   |
| 6. Mr. Fabian Sang     | - | Junior Legislative Fellow |

**IN ATTENDANCE**

- |                         |   |                         |
|-------------------------|---|-------------------------|
| Hon. Joshua Kutuny, MP  | - | Friend of the Committee |
| 1. Mr. Joshiah Oyuko    | - | Manager, Audit          |
| 2. Mr. Charles Kinuthia | - | Manager, Audit          |
| 3. Mr. John Wangia      | - | Manager, Audit          |

**MIN/NA/PIC/2018/287: PRELIMINARIES**

The Chairperson called the meeting to order at thirty five minutes past ten O'clock followed by a word of prayer from Hon. James Githua Wamacukuru, MP.

**MIN/NA/PIC/2018/288: CONFIRMATION OF MINUTES**

Minutes of the previous meetings were as follows:

- 1) Minutes of the 50<sup>th</sup> sitting were confirmed as a true record on the proceedings and as signed by the Chairman after being proposed by the Hon. Paul Kahindi Katana, MP and seconded by the Hon. Zachary Thuku, MP.
- 2) Minutes of the 51<sup>st</sup> sitting were confirmed as a true record on the proceedings and as signed by the Chairman after being proposed by the Hon. Paul Kahindi Katana, MP and seconded by the Hon. Zachary Kwenya Thuku, MP.
- 3) Minutes of the 52<sup>nd</sup> sitting were confirmed as a true record on the proceedings and as signed by the Chairman after being proposed by the Hon. Zachary Thuku, MP and seconded by the Hon. Zachary Kwenya Thuku, MP.
- 4) Minutes of the 53<sup>rd</sup> sitting were confirmed as a true record on the proceedings and as signed by the Chairman after being proposed by the Hon. Paul Kahindi Katana, MP and seconded by the Hon. Zachary Kwenya Thuku, MP.
- 5) Minutes of the 54<sup>th</sup> sitting were confirmed as a true record on the proceedings and as signed by the Chairman after being proposed by the Hon. Zachary Kwenya Thuku, MP and seconded by the Hon. Abdullswamad Sharrif, MP.
- 6) Minutes of the 55<sup>th</sup> sitting were confirmed as a true record on the proceedings and as signed by the Chairman after being proposed by the Hon. James Githua Wamacukuru, MP and seconded by the Hon. Mohamed Hire Garane, MP.
- 7) Minutes of the 56<sup>th</sup> sitting were confirmed as a true record on the proceedings and as signed by the Chairman after being proposed by the Hon. James Githua Wamacukuru, MP and seconded by the Hon. Mohamed Garane Hire, MP.
- 8) Minutes of the 57<sup>th</sup> sitting were confirmed as a true record on the proceedings and as signed by the Chairman after being proposed by the Hon. Mohamed Garane Hire, MP and seconded by the Hon. Paul Kahindi Katana, MP.

**MIN/NA/PIC/2018/289: MATTERS ARISING**

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Under the attendance in the 57<sup>th</sup> sitting, it was observed that the Hon. James Githua Wamacukuru was erroneously recorded as absent with apology instead of being present. The secretariat was asked to rectify.

**MIN/NA/PIC/2018/290: PROCUREMENT OF EXCISABLE GOOMS MANAGEMENT SYSTEM (EGMS)**

The Hon. Joshua Kutuny, MP appeared before the Committee and presented the following of the procurement of implementation of the EGMS:

- 1) The matter had been partially handled by the PIC in the 11<sup>th</sup> Parliament which recommended for a forensic audit. The Auditor General subsequently audited the matter and reported to Parliament at a time when the 11<sup>th</sup> Parliament had gone on recess sine die. This meant that the matter was discussed by the House afterwards.
- 2) The Tender for the installation of the EMGS by the KRA was irregularly awarded to the SICPA (a Switzerland company) on three fronts: KRA had no budget for the same leading to two cancellations after advertisements and award; it was single sourced; it was a duplication of the work done by KEBS; and it was too expensive
- 3) The regulations authorizing taxation of Kshs. 1.50 per bottle were never discussed and approved by the National Assembly as per the Statutory Instruments Act rendering their existence nugatory and in breach of Article 94.
- 4) Implementation of the EGMS will see SICPA collect Ksh.45 million daily; an amount that will reach Kshs.81 billion in 5 years against a contract sum of Kshs.17 billion. This means that a whopping balance of Ksh.64 billion will go to SCIPA.
- 5) In other countries such as Brazil and morocco, such system is implemented at a cheaper rate.
- 6) SCIPA's reputation worldwide is questionable as it was facing corruption charges in Brazil, and that it was rejected in both Morocco and Tanzania. This means that KRA did not do due diligence before awarding the contract.
- 7) Implementation of the EGMS system was scheduled for a roll out on 1<sup>st</sup> August 2018 despite the matter being active in the Supreme Court. Its roll out will force manufacturers to change their designs to conform with it at huge cost that will eventually be forwarded to the currently overtaxed consumers. Furthermore, multinational companies such as coca cola have been excluded from implementation the system. This indicates that there was preferential treatment in implementing the system to the detriment of the local infant manufacturing companies.
- 8) KRA has continued to intimidate the manufactures that have had a difference of opinion on the implementation of the System.

- 9) The Committee should expedite its enquiry into the matter. In the meantime, it was his prayer that the Committee requests the KRA to delay implementation of the system pending determination of all the issues surrounding it.

The Hon. Member finally tabled the following documents to the Committee:

- 1) 11<sup>th</sup> Parliament PIC's exit report
- 2) A document from KRA to the 11<sup>th</sup> Parliament PIC explaining the justification of the EGMS, procurement process of the EGMS; cost of installation of the system; stakeholder consultations on the EGMS; charge per stamp and Project system clarification from KEBS
- 3) Legal Notice No. 110 dated 18<sup>th</sup> June 2013 gazetting the Customs and Excise (Excisable Goods Management System) Regulations, 2013
- 4) Gazette notice 12856 dated 9<sup>th</sup> September 2013 from the Commissioner General of KRA gazetting Kshs. 1.50 per bottle
- 5) A memorandum from KAM to the PIC dated 7<sup>th</sup> August 2016
- 6) A document indicating various malpractices of SICPA across the world.

#### Committee resolution

- The matters presented were weighty and that they will be expedited;
- The auditor should prepare a thorough brief on all the issues touching the matter and present it to the Committee on Wednesday 1<sup>st</sup> August 2018.
- The Committee will meet with the Commissioner General of KRA on 7<sup>th</sup> August 2018 to get to the bottom of the matter.

#### MIN/NA/PIC/2018/291: ANY OTHER BUSINESS

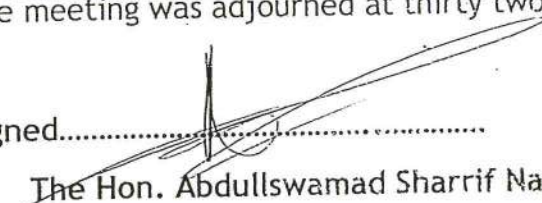
The Chairman read a letter from the Commissioner General of KRA indicating that he will not attend the scheduled Committee meeting on 31<sup>st</sup> July 2018 due to exigencies of duty out of the country. In the said letter, the Commissioner General requested the Committee that he appears on 7<sup>th</sup> August 2018; a request that the Committee subsequently granted.

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#### MIN/NA/PIC/2018/292: ADJOURNMENT

The meeting was adjourned at thirty two minutes past eleven o'clock.

Signed.....

  
The Hon. Abdullswamad Sharrif Nassir, MP

(Chairperson)

Date.....

14/08/2018

ANNEX 3 – SPECIAL  
AUDIT REPORT ON THE  
EGMS BY THE OFFICE  
OF THE AUDITOR  
GENERAL





*Annex (3)*

REPUBLIC OF KENYA

*CD/Comm 11005 1094*  
*ENA 02 7/07*  
P.O. Box 30084-00100  
NAIROBI

Telephone: +254-20-342330  
Fax: +254-20-311482  
E-mail: oag@oagkenya.go.ke  
Website: www.kenao.go.ke



OFFICE OF THE AUDITOR-GENERAL

C.868.C1 (12)

30 June, 2017

The Clerk of the National Assembly  
Parliament Buildings  
P.O. Box 41842-00100  
NAIROBI

CONFIDENTIAL

Dear *Clerk*

**SPECIAL AUDIT ON THE KENYA REVENUE AUTHORITY TENDER NO. KRA/HQRS/DP-423/2014-2015 FOR EXCISABLE GOODS MANAGEMENT SYSTEM**

The Special Audit Report of the Auditor-General on the Kenya Revenue Authority Tender No: KRA/HQRS/DP-423/2014-2015 for Excisable Goods Management System requested as per your letter Ref: KNA/PIC/CORR/2016/172 is now complete as provided for under Section 229(5) of the Constitution of Kenya.

Enclosed please find a copy of the Special Audit Report.

Yours *Sincerely*

*Edward R.O. Ouko*

FCPA Edward R.O. Ouko, CBS  
AUDITOR-GENERAL

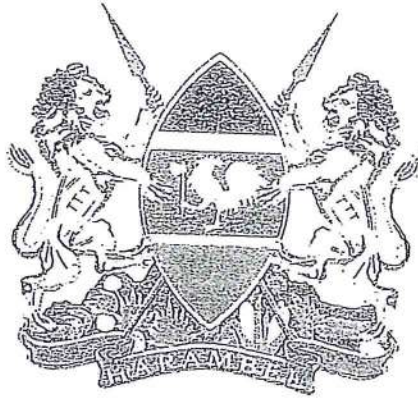
Encl.

Copy to: Dr. Kamau Thugge, EBS  
Principal Secretary  
National Treasury  
NAIROBI

RECEIVED  
05 JUL 2017  
CLERK'S OFFICE

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OFFICE OF THE AUDITOR- GENERAL

SPECIAL AUDIT REPORT

OF THE

AUDITOR-GENERAL

ON THE

TENDER FOR EXCISABLE GOODS MANAGEMENT (EGMS) SYSTEM FOR PRINTING,  
SUPPLY, AND DELIVERY OF SECURITY REVENUE STAMPS COMPLETE WITH TRACK  
AND TRACE SYSTEM, AND AN INTEGRATED PRODUCTION ACCOUNTING SYSTEM

KENYA REVENUE AUTHORITY

THE NATIONAL TREASURY

JUNE 2017

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## List of Abbreviations

The following abbreviations are used in this report.

Abbreviation	Full name
AC	Assistant Commissioner
AG	Attorney General
CG	Commissioner General
EABL	East Africa Breweries Limited
EGMS	Excisable Goods Management System
EOI	Expression of Interest
G.N	Gazette Notice
GOK	Government of Kenya
ICT	Information Communication Technology
LCD	Liquid Crystal Display
LTO	Large Taxpayers Office
OAG	Office of The Auditor General
KRA	Kenya Revenue Authority
L.N	Legal Notice
PIC	Public Investment Committee
PFMA	Public Finance Management Act
PLC	Public Limited Company
PPDA	Public Procurement and Disposal Act
PPOA	Public Procurement Oversight Authority
PPR	Public Procurement Regulations
PS	Principal Secretary
RTD	Retired
SAC	Senior Assistant Commissioner
SCORPIOS	Sistema de Controle e Rastreamento da Producao de Cigarrillos
TOR	Terms of Reference
VAT	Value Added Tax

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## 1 Executive Summary

### 1.1 Introduction

1.1.1 On 12 October 2016 the Clerk of the National Assembly vide letter reference KNA/PIC/CORR/2016/ 172, requested the Auditor-General to conduct a forensic audit on the Kenya Revenue Authority (KRA) tender number KRA/HQS/DP-423/2014-2015 for provision of Excisable Goods Management System (EGMS).

1.1.2 The letter required the audit to address the following issues:

- Review the procurement process of the Tender with focus on technical and evaluation of bids;
- Justification for Direct Procurement of the Tender;
- Due diligence report on SICPA SA, the company awarded the contract to supply the revenue stamps, with emphasis on the countries that have reported challenges with SICPA TRACE system supplied by SICPA SA. These include Brazil, Albania, Turkey, Philippines, Morocco and USA;
- Compliance of the tendering process with the Constitution, the Public Procurement and Disposal Act, 2005, Procurement Regulations, 2006, Statutory Instrument Act, 2013 and any other applicable Act of Parliament;
- Legal and financial implication of not submitting Legal Notice 110 of 18 June 2013 and Gazette Notice No. 12856 dated 05 September, 2013 by Cabinet Secretary National Treasury and Commissioner General, Kenya Revenue Authority respectively, for parliamentary scrutiny as required by Statutory Instrument Act of 2013;
- Value for Money Audit of the EGMS;
- Ascertain the concerns of double taxation to the manufacturers of excisable goods;
- Financial implication of the system on the cost of excisable goods; and
- Any other audit issue relating to the tender.

1.1.3 The special audit transformed the aforementioned issues requested by the Clerk into the following Terms of Reference (TORs) that guided the audit process.

- Historical background of the EGMS;
- Review of procurement process in line with the PPDA 2005, and the Statutory Instrument Act, 2013;
- Review of Legal Notice Number 110 of 18<sup>th</sup> June 2013 and Gazette Notice 12856 of 5<sup>th</sup> September 2013;
- Application of the system; and
- Value for Money.

1.1.4 Appendix I details how the issues raised by the Clerk to the National Assembly were transformed into the above TORs.

## 1.2 Objectives of the audit

1.2.1 The objectives of the audit was to review the project implementation process of EGMS in line with the issues raised by Clerk of the National Assembly to ascertain any irregularities and non-compliance with the statutory and legal provisions and recommend action to be taken.

## 1.3 Scope of work and structure of the report

1.3.1 The special audit reported on; historical background of the EGMS, review of procurement process in line with the PPDA 2005, review of the process of developing Legal Notice 110 of 18<sup>th</sup> June 2013 and Gazette Notice 12856 of 5<sup>th</sup> September 2013 and financial implication of implementing the system on the cost of excisable consumer goods.

1.3.2 The special audit report is structured as follows:

- 1) Executive Summary;
- 2) Detailed report;



- 3) Detailed findings; and
- 4) Appendices

1.3.3 The report should be read in its entirety in order to comprehend fully the approach to and findings of our work. The report has covered analysis and facts as understood, with the aim of informing the Public Investment Committee for decision making.

#### 1.4 Key Findings

##### Historical Background of EGMS

- 1.4.1 During the period 2003-2010, KRA relied on a manual method of affixing Excise and Revenue stamps on excisable goods that was only limited to tobacco, wines, spirits and beer. This method experienced rampant counterfeiting of stamps resulting in manufacturers under declaring volumes of their products leading to under collection of excise tax.
- 1.4.2 In this regard, a delegation of KRA officials visited Brazilian Inland Authority to learn the benefits of implementing a comprehensive excise stamps management system. The team established that Brazil had put in place a system known as SCORPIOS that was used for integrated control and tracking of cigarettes production and that there was a possibility to customize the system to respond to specific challenges in the Kenyan Market.
- 1.4.3 We were not availed any explanation/justification on why KRA opted to visit only Brazil and not any other Country yet several other countries such as Albania, Turkey, Philippines, Morocco, Canada and USA (California and Massachusetts States) had implemented a very similar system.

##### Review of procurement process

- 1.4.4 Procurement of EGMS commenced in the year 2010 and was done at three levels as noted below:
- 1.4.5 The first procurement, tender number, KRA/HQ5/060/2010-2011(EGMS I) commenced in August 2010 when an expression of interest was advertised by KRA. Tenders were subsequently issued in June 2011 where SICPA Security Solutions SA emerged as the only qualifying bidder.

- 1.4.6 The special audit established a case where the then Deputy-Commissioner, Procurement and Supplies Services interfered with the independence of the Evaluation Committee by issuing a memo to the Chairman of the Evaluation Committee requesting a review of EOI evaluation report “*to eliminate the aspect of digital solutions*” with an aim to increase the number of potential applicants. This raised doubt on the objectivity of the evaluation report.
- 1.4.7 Further, the actions by the then Deputy-Commissioner, Procurement and Supplies Services to alter the EOI tender by eliminating the aspect of digital solutions amounted to change of substance of a tender contrary to Section 59(3) of PPDA, 2005 that prohibits procuring entities from attempting to have the substance of a tender changed after the deadline of submitting tenders.
- 1.4.8 The tender was thereafter terminated in September 2011 due to budgetary limitations, an indication that KRA commenced the procurement process without confirming that sufficient funds were available contrary to Section 26(6) of the PPDA, 2005, that prohibits procuring entities from commencing any procurement procedure until it is satisfied that sufficient funds have been allocated for such purpose.
- 1.4.9 The second procurement (EGMS II) tender number KRA/HQS/ICB-037/2011-2012 commenced through an International Competitive Bidding process in March 2012. The tender process concluded in December 2012 with the award of the contract to SICPA Security Solution SA.
- 1.4.10 Consequently, KRA and SICPA Security Solution SA entered into contract for supply of Security Printed Revenue Stamps, Track and Trace Software Solution and Integrated Production Accounting System for a period of five years at a contract sum of Euros42,471,464 the equivalent of Kshs.4,808,134,887.
- 1.4.11 On 18 June 2013, the Cabinet Secretary in charge of the National Treasury issued Legal Notice number 110 (L.N 110) that expanded the scope of items to be covered under the EGMS to include all excisable goods except motor vehicles manufactured in or imported into Kenya.

- 1.4.12 On 15 May 2015, the KRA Tender Committee approved the termination of the contract between KRA and SICPA Security Solution SA, on the premise that the contract could not cover the extended scope of excisable goods provided for under L.N110 of 18<sup>th</sup> June 2013. Variation of the existing contract could have exceeded the twenty-five (25) percent threshold allowed under Section 9 of the Public Procurement Amendment Regulations, 2013.
- 1.4.13 Consequently, KRA initiated the third procurement (EGMS III) tender number KRA/HQS/DP/423/2014-2015 as a direct procurement involving negotiation with SICPA Security Solutions SA.
- 1.4.14 The negotiations sought to expand the scope of the contract awarded in December 2012 (EGMS) to include additional items introduced by the Cabinet Secretary in charge of the National Treasury vide Legal Notice 110 of 18<sup>th</sup> June 2013. Legal Notice 110 of 2013 required every package of the excisable goods except motor vehicle, manufactured in or imported into the country be affixed with an excise stamp.
- 1.4.15 The negotiations culminated into a contract between KRA and SICPA Security Solutions SA for supply of the EGMS at a contract sum of a minimum Kshs.15,909,293,482 and a maximum of Kshs.17,156,333,818 (depending on number of orders made by KRA) for a period of five (5) years.
- 1.4.16 The Tender Committee cited the existence of proprietary software that had been procured under the contract dated December 2012 as a rationale for engaging in direct negotiations with SIPCA Securities Solutions SA. Accordingly, an alternative supplier would have meant compelling manufacturing businesses to install a parallel software which would not be cost effective for the manufacturers and eventually costly for consumers.
- 1.4.17 It was noted that may have been no consultation between KRA and the National Treasury with the manufacturers and importers prior to the implementation and before issuing the statutory instrument contrary to Section 5 of the Statutory Instruments Act, 2013 that requires public participation in financial matters.

Legal Notice 110 of 18th June 2013 and Gazette Notice 12856 of 5th September 2013

- 1.4.18 On 18<sup>th</sup> June 2013, the Cabinet Secretary of the National Treasury issued a Legal Notice that required all excisable goods except motor vehicles manufactured in or imported into Kenya to be affixed with excise stamps.
- 1.4.19 On 05<sup>th</sup> September 2013, the Commissioner-General of KRA issued Gazette Notice number 12856 that prescribed the price of an excise stamp to be one shilling and fifty cents (Kshs.1.50).
- 1.4.20 There was no evidence that both Legal Notice 110 and Gazette Notice 12856 were submitted by the Cabinet Secretary of the National Treasury and the Commissioner-General of KRA to the National Assembly for scrutiny contrary to section 11(1 - 4) of the Statutory Instruments Act, 2013.

#### Financial implication of implementing EGMS on cost of production

- 1.4.21 The special audit established that though manufacturers had incurred additional costs in installation of the EGMS, they had absorbed the costs within their profit margins instead of transferring the costs to the consumers for fear of losing on the market share.
- 1.4.22 It was also established that other than KRA, other Government Agencies such as Kenya Bureau of Standards and Anti-Counterfeit Agencies (ACA) had set up multiple authentication systems which resulted in increase in the cost of doing business.
- 1.4.23 Among the manufactures and importers interviewed, none of them availed any evidence to indicate that the introduction of EGMS had resulted in double taxation of the manufactures/importers.

#### Value for Money

- 1.4.24 Value for money auditing examines whether public organizations or programs have attained effectiveness, economy and efficiency in the management of resources at their disposal.

1.4.25 The objective of establishing the EGMS was to bring in more excise tax payers to increase tax collections by KRA that had been threatened by counterfeiting of stamps and manufacturers under declaring volumes of their products.

1.4.26 A review of data from KRA established that as a results of implementation of EGMS in the year 2010, together with relevant statutory instruments introduced in 2013, there has been a significant increase in amounts of excise duty collected by KRA on Cigarettes, Spirits and wines by between 12 per cent to 43 per cent.

1.4.27 In view of the foregoing, the special audit therefore noted that whereas the acquisition of EGMS by KRA realized effectiveness in terms of increased collection, there was no evidence to prove that the process either realized or did not realize efficiency and economy as aspects of value for money.

#### 1.5 Irregularities and Culpabilities

The following irregularities were observed during the audit:

Irregularity	Law Violated	Amount involved	Responsible person	Remarks
Alteration of the substance of the EOI for tender number KRA/HQS/060/2010-2011 by authorizing elimination of the aspect of digital solutions during tender evaluations	Section 59(3) of PPDA, 2005 prohibits Procuring Entities from attempting to have the substance of a tender changed after the deadline of submitting tenders	N/A	The then Deputy Commissioner, Procurement and Supplies Services, Ms. Grace Murichu	Though there was no evidence of money lost, the then Deputy-Commissioner, Procurement and Supplies Services directed the Evaluation Committee on 16 <sup>th</sup> May 2011 to review evaluation report to eliminate the aspect of digital solutions thus changing the substance of the tender.
Failure to ensure that sufficient funds were available prior to initiating the 1 <sup>st</sup> procurement of EGMS tender number KRA/HQS/060/2010-2011	Section 26(6) of the PPDA Act 2005 which states a procuring entity shall not commence any procurement procedure until it is satisfied that sufficient funds have been set aside in its budget to meet the obligations of the resulting contract.	Contract sum of Euro 20,090,700	The then Deputy-Commissioner, Procurement and Supplies Services, Ms. Grace Murichu	Though there was no evidence of money lost, the then Head of Procurement failed to ensure availability of adequate funds prior to initiating the procurement process.

Irregularity	Law violated	Amount involved	Responsible person	Remarks
Failure to submit Legal Notice No 110 of 18 June 2013 and Gazette Notice No. 12856 of September 2013 for Parliament for scrutiny as provided in the Statutory Instrument Act of 2013.	Section 11 of the Statutory Instruments Act, 2013 requires Cabinet Secretary responsible for a regulation-making authority to ensure Statutory Instruments are submitted to Parliament for Scrutiny	N/A	Cabinet Secretary for National Treasury and Commissioner-General, KRA	The CS and the Commissioner General failed to submit Legal Notice No 110 of 18 June 2013 and Gazette Notice No. 12856 of September 2013 respectively to Parliament for Scrutiny contrary to Section 11 of the Statutory Instruments Act, 2013.

## 1.6 Conclusion

1.6.1 Prior to implementation of EGMS, KRA used a manual method of affixing stamps on excisable goods. This method was less effective as it experienced rampant counterfeiting of stamps that led to loss of revenue. KRA therefore made three (3) attempts to procure a system to address these issues. The final attempt resulted in the KRA engaging in direct negotiations to obtain the system from SICPA Security Solutions SA. The negotiations culminated into a contract between KRA and SICPA Security Solutions SA for supply of the EGMS at a contract sum of a minimum Kshs.15,909,293,482 and a maximum of Kshs.17,156,333,818 (depending on number of orders made by KRA) for a period of five (5) years. The Tender Committee cited the existence of proprietary software that had been procured under the contract of December 2012 as a rationale for engaging in direct negotiations with SIPCA Securities Solutions SA. Accordingly, an alternative supplier would have meant compelling manufacturing businesses to install a parallel software which would not be cost effective for the manufacturers and eventually costly for consumers.

1.6.2 The Cabinet Secretary/The National Treasury and the Commissioner-General of KRA issued Legal Notice number 110 and Gazette Notice number 12856 respectively that prescribed the price of an excise stamp to be one shilling and fifty cents (Kshs.1.50) without submitting the two statutory instruments to Parliament for scrutiny contrary to Section 11(1) of the Statutory Instruments Act, 2013. Also, the special audit noted that the procurement process was characterized by certain violations of the Public

Procurement and Disposal Act, 2005, which included initiation of procurement process without adequate funds, change of substance of the tender and attempts to interfere with the independency of Tender Evaluation Committee.

- 1.6.3 The special audit noted that the breakdown of per unit pricing of stamps of Kshs.1.50 per stamp comprised of the following components:

Component	Cost (Kshs)
Stamp cost	0.61
Software platform	0.31
Production line Accounting	0.58
Total cost	1.50

However, the pricing of Kshs.1.00 per stamp was the total cost of a stamp which excluded the Software platform and Production Line Accounting. Further, SICPA SA indicated they could not disclose information in regard to pricing of stamps for other countries and/or Revenue Authorities due to existing confidentiality agreements between SICPA and various Revenue Authorities in other countries. Under the circumstance, it was not possible to compare the pricing of stamps for various excisable products in various countries.

## 1.7 Recommendations

- 1.7.1 KRA should put in places measures to ensure that prior to initiating any procurement, a market survey is conducted to establish the average market price of goods/services. This will enhance linkage between budgeting and planning that will in turn ensure no procurement is initiated without evidence of adequate funds. KRA should also ensure that it promotes competition while procuring goods and services as a way of enhancing efficiency and economy in utilization of public funds. Further, KRA should put in place measures to discourage the Procurement and Supplies Department from giving instructions to the Evaluation Committee to alter evaluation results as this is considered as interfering with the independence of the Evaluation Committee against the spirit of the Public Procurement and Disposal Act, 2005.

1.7.2 The Cabinet Secretary in charge of the National Treasury and the Commissioner-General of the KRA should liaise with the National Assembly to regularize the non-compliance concerns of Legal Notice Number 110 and Gazette Notice Number 12856 to avoid any litigation for contravening statutory and legislative provisions. The Cabinet Secretary in charge of the National Treasury and the Commissioner-General of the KRA should also liaise and consult with the manufacturers and importers affected by the implementation of the EGMS system to avoid the risk of manufacturers incurring losses/ increase in prices of excisable products. Further, various Government Agencies involved in fighting of counterfeit products should consider coming up with a universal stamping regime to eliminate the multiple stamping systems that may end up increasing the cost of production for investors in Kenya.



FCPA EDWARD R. O. OUKO, EBS  
AUDITOR - GENERAL

30 JUNE 2017



## **2 DETAILED REPORT**

### **2.1 Background**

- 2.1.1 The Kenya Revenue Authority (KRA) was established in 1995 under KRA Act, Chapter 469 of the Laws of Kenya to provide the government with facilitative agency services for collection and receipt of all revenue.
- 2.1.2 Its main functions is to assess, collect and account for all revenue in accordance with the laws and advice the government on all matters relating to the administration of, and collection of revenue under laws and provisions set out.
- 2.1.3 Excise stamps were introduced in 2003 and were rolled out in three (3) phases as follows; Phase I: effected in 2003 and covered tobacco products only, Phase II: effected in 2007 covering tobacco, wines and spirits and Phase III: effected in 2012 covering tobacco, wines and spirits but the scope was expanded to include both excise stamp and Track and Trace system used by KRA for monitoring the production and distribution of the products in the market.
- 2.1.4 Reports at KRA indicated that in the year 2009, there was rampant counterfeiting of stamps and also some manufacturers were under declaring volumes of their products with a view to evade excise tax. Further, the stamps lacked security features and it was therefore difficult to differentiate counterfeit from real stamp.
- 2.1.5 In view of the aforementioned weaknesses, in the year 2010 KRA made a decision to review the excise stamps programme with a view to introduce a more reliable framework.

### **2.2 Introduction**

- 2.2.1 On 12 October 2016 the Clerk of the National Assembly vide letter reference KNA/PIC/CORR/2016/ 172, requested the Auditor- General to conduct a forensic audit on the Kenya Revenue Authority (KRA) covering various issues.
- 2.2.2 The special audit transformed the issues raised by the Clerk into the following five (5) Terms of Reference (TORs) as summarized below and detailed in Appendix I.
  - Historical Background of the EGMS;

- Review of Procurement process in line with PPDA 2005, and other Statutory Instrument Act 2013;
- Review of Legal Notice 110 of 18th June 2013 and Gazette Notice 12856 of 5th September 2013;
- Application of the System; and
- Value for Money.

### 2.3 Scope of work

2.3.1 The audit reviewed the procurement and project management processes of EGMS focusing on: Historical Background of the EGMS; Review of Procurement process in line with PPDA 2005, and other Statutory Instrument Act 2013; Review of Legal Notice number 110 of 18<sup>th</sup> June 2013 and Gazette Notice 12856 of 5<sup>th</sup> September 2013, application of the system and Value for money.

Source of information and audit procedures:

2.3.2 We obtained information based on the following audit procedures:

- a) Document examination: several documents were reviewed in the course of the audit. These included tender processing minutes and payment vouchers;
- b) Data analysis: of information collected from manufacturers regarding the cost implication of the EGMS on prices of goods;
- c) Site visit: The special audit conducted site visit at SICPA SA in Switzerland on 22 and 23 May 2017 and met SICPA SA Management team; and
- d) Key members of staff from finance, procurement and administration were interviewed as a way of gathering information.

2.3.3 Officers interviewed during the special audit were identified depending on the role they played as indicated below:

Table 1: List of persons interviewed

	Name	Org	Current designation	Date interviewed
1	Mr. E.K. Saina	KRA	Commissioner -Support Services	27 March 2017

	Name	Org	Current designation	Date interviewed
2	Mr. Reuben Kiprono	KRA	Procurement Officer	27 March 2017
3	Mrs E.N. Kingori	KRA	Rtd Senior Deputy Commissioner Finance then -Secretary Tender Committee	28 March 2017
4	Ms. Alice Owuor	KRA	Rtd Commissioner then - Chairman Tender Committee	28 March 2017
5	Ms Grace Muricho	KRA	Deputy Commissioner Procurement and Supplies Secretary Tender Committee	28 March 2017
6	Mr. Caxton Ngeiyo Masudi	KRA	Chief Manager Market Surveillance Division Domestic Taxes Department	28 March 2017
8	Mr. Nick Wambugu	Office of the President	Then SAC ICT Chairman Inspection and Acceptance Committee Member	28 March 2017
9	Mr. Julius Yiega	KRA	SAC ICT - Chairman Inspection and Acceptance Committee	28 March 2017
10	Ms. Jane W. Mwihi	KRA	AC -Human Resource Vice Chairperson Inspection and Acceptance Committee	28 March 2017
11	Ms. Philgona Wairimu Nganga	KRA	Commissioner -legal	29 March 2017
12	Mr. Samuel Aboge	KRA	Deputy Commissioner - Domestic Revenue - Then Chairperson Evaluation Committee	29 March 2017

2.3.4 During the site visit to the Headquarters of the SICPA, SA based in Lausanne - Switzerland, the special audit team met the following SICPA SA Management staff on 23<sup>rd</sup> and 24<sup>th</sup> May 2017.

Table 2: SICPA Management team present during site visit

	Name	Designation
1	Phillippe Amon	Chairman and CEO

	Name	Designation
2	Mr. Bruno Frentzel	Executive President and CCO
3	Mr. Michele Castegnaro	Regional Vice President Business Development Africa & Managing Director
4	Mr. Eric Corbier	Chief Commercial Officer, Government Security Solutions
5	Mr. Richard Frey	Head of Group Corporate Services and Group General Counsel
6	Mr. Cedric Siebenmann	Director Operations & Supply Chain Government Security Solutions
7	Mr. Ben Sapin	Regional Counsel, Government Security Solution
8	Mr. Dominique Bethenod	Printing Solutions & Technology Manager , Government Security Solutions
9	Mr. Thomas Morisot	Design and Integration Manager Security Inks Solution
10	Mr. Eric Corbier	Chief Commercial Officer, Government Security Solutions
11	Ms. Christine Macqueen	Director Corporate Affairs

#### 2.4 Challenges and limitations

- 2.4.1 KRA management did not avail Inspection and Acceptance Minutes for Track and Trace software and Integrated Production Accounting System.

### 3 DETAILED FINDINGS

#### 3.1 Historical Background of EGMS

- 3.1.1 Excisable tax is a duty imposed on goods & services manufactured in Kenya or imported into Kenya. The 1<sup>st</sup> schedule of the Excise Duty Act, 2015 specifies the goods and services that are currently subject to Excisable tax as detailed in Appendix II.
- 3.1.2 KRA requires that excisable goods and services be affixed with Excise and Revenue stamps as evidence of payment of excise tax. During the period 2003-2010, KRA relied on a manual method of affixing Excise and Revenue stamps on excisable goods that was only limited to tobacco, wines, spirits and beer.
- 3.1.3 However, this method experienced numerous challenges including; rampant counterfeiting of stamps and manufacturers under declaring volumes of their products leading to under collection of excise tax. Further, the stamps lacked security features in that it was difficult to tell counterfeit from real stamp.
- 3.1.4 As a results of the aforementioned weaknesses of the Excise and Revenue stamps system, a delegation of KRA officials visited Brazilian Inland Authority from the 20 to 24 April 2010 to learn among other tax management issues, the benefits of implementing a comprehensive excise stamps management system. The team comprised the then Commissioner-General Mr. Michael Waweru, Commissioner of Large Tax Office, Mr. John Njiraini, Deputy-Commissioner of ICT, Mr. Ezekiel Maina and Mr. Caxton Masudi Ngeiywo.
- 3.1.5 The team established that Brazil had put in place a system known as SCORPIOS (Sistema de Controle e Rastreamento da Producao de Cigarrillos) that was used for integrated control and tracking of cigarettes production.
- 3.1.6 The team further noted that; there was a possibility to customize the system to respond to specific challenges in the Kenyan Market and that this could be attained through KRA floating Expression of interest (EOI) to compare various existing systems in the market. In addition, the KRA was to ensure implementation of the system was supported by a special legislation that specifies obligations of various stakeholders.

3.1.7 An independent research conducted by the special audit and interviews with Management of SICPA Kenya Ltd and the parent company SICPA SA based in Switzerland established that EGMS has and in certain instances, continues to be used by governments in Brazil, Albania, Turkey, Morocco, Canada and USA (California and Massachusetts States). SICPA SA confirmed their footprint in over 180 countries.

3.1.8 The Cabinet Secretary in charge of the National Treasury issued a Legal Notice No. 110, EGMS Regulations on 18 June 2013. Section 3 of the EGMS Regulations requires every package of the excisable goods except motor vehicle, manufactured or imported into the country to be affixed with an excise stamp of a type and in a manner specified by the Commissioner. Prior to these regulations, only tobacco, wines, spirits and beer had an excise stamp.

### 3.2 Procurement Process of the EGMS

3.2.1 The procurement process for the EGMS commenced in 2010 as a results of the challenges encountered by the previous Excise and Stamp system. The special audit established that KRA made three (3) attempts to procure an EGMS during this period, as follows:

Table 3 : Attempts made by KRA to procure EGMS

Particulars	Period	Tender No	Remarks
1 <sup>st</sup> Procurement (EGMS I)	August 2010-September 2011	KRA/HQS/060/2010-2011	Tender terminated due to budgetary constraints
2 <sup>nd</sup> Procurement (EGMS II )	March -December 2012	KRA/HQS/ICB-037/2011-2012	Tender awarded to SICPA Solutions SA for a period of 5 years.
3 <sup>rd</sup> Procurement (EGMS III )	January 2015	KRA/HQS/DP/423/2014-2015	Triggered by LN 110 of June 2013 that expanded scope of work of EGMS II to cover all excisable goods exempt Motor vehicles.

3.2.2 The first procurement of the EGMS (EGMS I), tender number KRA/HQS/060/2010-2011, commenced in August 2010 with an advertisement for an expression of interest. Tenders were subsequently issued in June 2011 where SICPA Security Solutions SA

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emerged as the only qualifying bidder. The tender was thereafter terminated in September 2011 by the procuring entity, citing budgetary limitations.

3.2.3 The second procurement of the EGMS (EGMS II), tender number KRA/HQS/ICB-037/2011-2012, commenced through International Competitive Bidding in March 2012. The tender process concluded in December 2012 with the award of the contract to SICPA Security Solution SA for the supply of Security Printed Revenue Stamps, a Track and Trace Software Solution, and an Integrated Production Accounting System for a period of five (years).

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3.2.4 The third procurement of the EGMS (EGMS III) tender number KRA/HQS/DP/423/2014-2015 was initiated in January 2015, by engaging the existing service provider, SICPA Security Solutions SA into a negotiation that resulted into a direct procurement. The negotiations sought to expand the scope of the contract awarded in December 2012. The expansion of the scope of work was triggered by Legal Notice No. 110 of 2013 that required every package of the excisable goods except motor vehicle, manufactured in or imported into the country be affixed with an excise stamp.

**EGMS I, Tender Number KRA/HQS/060/2010-2011 for Provision of Security printing and Digital Solutions for revenue protection**

3.2.5 The procurement process commenced with Expression of Interest (EOI) to determine /prequalify firms that had capabilities to participate in the tendering process after which the prequalified firms were invited to submit bids through a request for proposal (RFP)

**Expression of Interest (EOI)**

3.2.6 The EOI was advertised on 19 August 2010 in The People Daily newspaper and indicated a closing date of 22 September 2010. There was no evidence that the EOI was advertised in at least two (2) newspapers of wide national circulation, contrary to section 78 (3) PPDA 2005.

3.2.7 A review of the EOI opening minutes established that tenders were opened on 22 September 2010 and twenty-one (21) firms detailed in Appendix III submitted their bids. The tender opening committee comprised; Mr. Collins Mukongo - Chairperson,

Ms. Mary Wamalwa - SAC- Secretary, Mr. Patrick Wanjuki - Member and Mr. George Wahome - Member.

3.2.8 On 11 October 2010, the following KRA officers were appointed by the Commissioner General to carry out evaluation of the EOI;

Table 4 : Technical Evaluation Committee for EOI of EGMS I

No	Name	Designation
1	Mr. Samuel Aboge	Chairman
2	Mr. James Ojee	Member
3	Mr. Wilfred Okemwa	Member
4	Mr. George Muia	Member
5	Ms. M A Wamalwa	Procurement Secretariat
6	Mr. Reuben Kiprono	Procurement Secretariat

3.2.9 The evaluation process commenced on 18 October 2010 and a report issued on 10 December 2010. A review of the technical evaluation report established that the committee observed that it lacked background information on user department needs and that the criteria for evaluation of the tender had not been provided.

3.2.10 The twenty-one (21) bidders were subjected to preliminary evaluation criteria to determine whether or not they were responsive. A firm was considered responsive if it produced evidence of the following requirements: Articles of Incorporation and Structure; Registration and Accreditation Certificate; Details of the work performed in the last three years as prime contractor for Security Printing and Digital Solutions; Reference list of previous clients for similar contracts completed in the past three years; Plant and machinery information and qualification and experience of key personnel.



- 3.2.11 The bidders were also required to bid for both Provision of Security printing and Digital Solutions for revenue protection. Sixteen (16) firms detailed in Appendix IV were therefore considered non responsive as they failed to meet the preliminary evaluation requirements, while five (5) firms were deemed responsive, these were: De La Rue Currency and Security Print Ltd; Authentix Limited; Edaps Consortium; Filtrona PLC and SICPA Security Solutions SA.
- 3.2.12 On 16 May 2011 the then Deputy-Commissioner in charge of Procurement and Supplies Services, Ms. Grace Murichu wrote a memo to Mr. Samuel Aboge the Chairman Evaluation Committee requesting a review of the evaluation report to eliminate the aspect of digital solutions with an aim to increase the number of potential applicants.
- 3.2.13 The special audit observed that the actions by the then Deputy-Commissioner in charge of Procurement and Supplies Services to alter the EOI tender by eliminating the aspect of digital solutions amounted to change of substance of a tender contrary to section 59(3) of PPDA, 2005. The section prohibits Procuring Entities from attempting to have the substance of a tender changed after the deadline of submitting tenders.
- 3.2.14 Subsequently, the evaluation report was reviewed on 30 May 2011 and the following four (4) additional firms initially considered non responsive for failure to include the aspect of digital solutions in their bids were considered responsive; Tall Security Print Ltd; Madras Security Printers Private Ltd; American Bank note Co and Holistic India Ltd.
- 3.2.15 The evaluation committee recommended the nine (9) responsive firms to be considered for invitation to Request for Proposal (RFP). On 2 June 2011, the tender committee approved the nine (9) shortlisted firms to participate in the RFP.

#### Request for Proposals (RFP)

- 3.2.16 KRA sent a Request for Proposal (RFP) to the nine (9) prequalified firms. Tender opening was done on 2 September 2011 and the following six (6) out of the nine (9) firms submitted their bids: Madras Security Printers Ltd; Authentic Dallas Corporate; De La Rue Ltd; Holistic India Ltd; Edaps Consortium and SICPA Security Sol. SA. The

tender opening committee comprised Mr. Samuel K. Limo (Chairing), Mr. Caxton M. Ngeywo, Mr. Harwings M. Omondi, Mr. Daniel G. Wachira and Ms. Ann N. Irungu.

3.2.17 The bids were evaluated on 22 September 2011 at three levels: Determination of tender responsiveness, vendor evaluation and technical evaluation. The evaluation was done based on the firms' experience, profile, reputation and social obligation. Out of the six (6) bidders, one bidder, De La Rue Ltd was eliminated for failure to submit Sworn Anti-Corruption affidavit as was required. The remaining five (5) bidders proceeded to vendor evaluation stage.

3.2.18 Vendor evaluation entailed scrutiny of documents submitted to determine capability of bidders in supplying the required procurement items. The maximum scores under this criteria was a ten (10), and a cut off was set at an eight (8). The firms scored as follows:

Table 5 : Vendor Evaluation Score for RFP of EGMS I

Firm	Score	Remarks
Madras Security Printers	6.2	Non responsive
Authentix INC.	8.8	Responsive
Holistik India Ltd	4.6	Non responsive
Edaps Consortium	4.7	Non responsive
SICPA Security Solutions SA	10	Responsive

3.2.19 Two (2) firms Authentix Inc. and SICPA Security Solutions SA passed the vendor evaluation criteria and proceed to technical evaluation stage. Technical evaluation was conducted on the two (2) responsive firms based on Security and design requirement, coding requirements of revenue stamps, control and monitoring system requirements and system and performance requirement.

- 3.2.20 The maximum score was eighty (80) and the cut off score for successful bidder was sixty-eight (68). SICPA Security Solutions scored seventy-six (76) and was considered responsive and therefore proceeded to financial evaluation while Authentix Inc. scored forty-three (43) and was considered non responsive.
- 3.2.21 Financial evaluation was done on 4 October 2011 and the evaluation committee recommended award of contract to SICPA Security Solutions SA at an annual cost of Euro 6,696,900 and a total cost of Euro 20,090,700 for the five years contract.
- 3.2.22 On 21 October 2011, the KRA terminated the tender citing lack of adequate funds. The Deputy Commissioner in charge of Procurement and Supplies Services, Ms. Grace Murichu wrote to all the participating bidders informing them that the tender had been terminated. This implied that KRA commenced of procurement process without having adequate funds in place contrary to section 26(6) of the PPDA Act 2005. This section prohibits procuring entities from commencing any procurement procedure until it is satisfied that sufficient funds have been set aside in its budget to meet the obligations of the resulting contract.
- EGMS II, International Competitive Bidding tender number KRA/HQS/ICB-037/2011-2012 for Provision of Security Printed Revenue Stamps and Integrated Production Accounting System**
- 3.2.23 This tender was triggered by termination of the 1<sup>st</sup> procurement (EGMS I). The tender was advertised on 30 March 2012 on the Daily Nation with a closing date of 25 April 2012 which was latter extended to 30 May 2012. There was no evidence that the tender was advertised at least twice in a newspaper of general nationwide circulation contrary to section 54 (2) PPDA 2005.
- 3.2.24 Tender opening was done on 30 May 2012. The following seven (7) firms submitted their bids: Edaps consortium; Holistic India Ltd; Security Printing Press; De La Rue Ltd; Madras Security Printers; Authentix Dallas Ltd and SICPA Security Solutions SA. It was noted that most of these firms participated in the 1<sup>st</sup> procurement (EGMS I).
- 3.2.25 Evaluation of bids were done on 26 June 2012 at three levels; tender responsiveness, vendor evaluation and technical evaluation. The evaluation committee comprised; Mr. Samuel K. Limo (Chairing), Mr. Caxton M. Ngeyo, Ms. Ann N. Irungu, Mr. Harwings M.

Omondi, Mr. Jeremiah Kinyua, Ms. Mary Wamalwa, Ms. Lorna Wataku and Mr. Mauti Ombasa.

3.2.26 At tender responsive stage, successful bidders were required to provide two envelopes of the bids, Physical Address, Tender Security, Power of Attorney, Manufacturers Authorization Certificate of Incorporation, and a copy of Trading License. The following four (4) bidders were eliminated as they did not meet the criteria set as listed below:

Table 6 : Tender responsive Evaluation for EGMS II

	Bidder	Reason for disqualification
1	Edaps consortium	Did not submit two envelope bid and did not indicate physical address.
2	Security Printing Press	Did not submit two envelope bid, tender security, power of Attorney and Manufacturers Authorization
3	De La Rue Ltd	Did not submit tender security
4	Authentix Dallas Ltd	Did not submit Certificate of Incorporation and copy of trading license

3.2.27 The remaining three (3) bidders Holistic India Ltd, Madras Security Printers Private Ltd and SICPA Solutions SA were considered responsive and proceeded to the vendor and technical evaluations. Vendor and technical evaluations were done based on company profile, managerial and key personnel competency profile, financial resources, physical facilities, experience, reputation and social obligations.

3.2.28 The Maximum score was set at sixty (60) marks while the cut-off score at fifty (50) marks. SICPA Solutions SA scored sixty marks (60) marks while Madras Security Printers Private Ltd and Holistic India Ltd attained scores of thirty-three (33) and thirty (30) marks respectively. Since SICPA Solutions SA passed the cut off score, it proceeded for financial evaluations.

3.2.29 Financial evaluation was done on 27 June 2012, SICPA Security Solutions SA emerged as the lowest evaluated responsive bidder and was recommended for award of contract for supply of Security Printed Revenue Stamps, Track and Trace Software solution and Integrated Production Accounting System for a period of five years at a contract sum of Euro (€) 42,471,464 (Equivalent to Kshs.4,552,516,226 )

3.2.30 KRA conducted due diligence in Canada, Brazil, Turkey and the State of California, USA, where SICPA SA had delivered its services. Due diligence was done via emails send by KRA to the four (4) countries seeking confirmation on the various issues.

3.2.31 All the four (4) countries gave positive response as follows:

Table 7 : Due diligence report for EGMS II

	Due diligence issue raised by KRA	Response by respective Countries			
		Canada	Brazil	Turkey	California
1	Nature and value of contract	Design, production and distribution of a new excise stamp to generate approximately 1.65 billion stamps	To control and provide a track and trace system for all the cigarettes products in Brazil at a contract sum of \$75,000,000 per year	Installation and operation of Band roled product Tracking system at a contract sum of \$154,698,355 for five years	Cigarettes tax stamps utilizing digital technology at a contract sum of \$8,500,000 per annum for five years
2	Satisfaction on the services rendered	Satisfied	Satisfied	Satisfied	Satisfied
3	Ability to provide goods and services being procured (Stamps, Track and Trace Software & Integrated Production Accounting)	Satisfied	Satisfied	Satisfied	Satisfied

3.2.32 A review of the emails established that all the countries gave positive response, the special audit further circularized audit requests to confirm with these countries and no negative concerns were received from those who responded as at the time of this audit report.

3.2.33 The tender committee meeting held on 26 November 2012, awarded the contract for Printing, Supply and Delivery of Security Revenue Stamps complete with Track and Trace System and Integrated Production Accounting system to SICPA Security Solutions SA at a total cost of Euro42,471,464, for a period of five years as follows;

Table 8B : Price Summary Schedule for EGMS II

	Item	Cost for 5 years (Euro)
1	Provision of Security Printing Revenue Stamps	20,341,464
2	Provision of Track and Trace Solution	10,450,000
3	Provision of Integrated Production Accounting system	11,680,000
	Total (Kshs.)	42,471,464

3.2.34 KRA sent a notification of award to SICPA Solutions SA and letters to unsuccessful bidders on 14 December 2012. SICPA Solutions SA accepted the award vide letter dated 20 December 2012.

3.2.35 On 18 April 2016, the KRA and SICPA Security Solutions SA entered into contract for Printing, Supply and Delivery of Security Revenue Stamps complete with Track and Trace System and Integrated Production Accounting system at a contract sum of Euro42,471,464 as summarized below and detailed in Appendix V:

Security Printed Revenue Stamps	Euros 20,341,464
Track and Trace Software	Euros 10,450,000
Integrated Production Accounting System	Euros 11,680,000

Total contract cost

Euros 42,471,464

Approx. (Kshs. 4,808,134,887)

3.2.36 The above items were delivered by SICPA SA to KRA on diverse dates between 27 March 2013 and 17 September 2015. KRA however, did not provide any evidence that the Inspection and Acceptance Committee inspected and reviewed the goods and services in order to ensure compliance with specifications contrary to Regulation 17(3) of the Procurement Regulations, 2006.

3.2.37 Records at KRA indicated that as at the time of completion of these special audit, KRA had paid SICPA Security Solutions SA Kshs.2,423,588,993 as summarized below and detailed in Appendix VI. The payment records for EGMS 1 by KRA reconciled with those at SICPA SA.

Table 9 : Payments made by KRA to SICPA for EGMS II

	Item	Amount
1	Stamps	1,010,422,740
2	Track and trace	171,676,573
3	Installation and maintenance	1,241,489,680
	Total (Kshs)	2,423,588,993
	Total (Euros)-1 Euro= Kshs.115	21,074,687

3.2.38 The tender committee on 15 May 2015 approved termination of the contract with SICPA Security Solution SA. The reasons given for the termination of the tender was that the current existing contract could not cover the extended scope of excisable goods provided for under Legal Notice 110 which required the EGMS system to cover all excisable goods except motor vehicles.

3.2.39 On 17 July 2015, KRA wrote a letter referenced KRA/HQS/DP/423/2014-2015 to SICPA Security Solution SA expressing its intention of terminating this contract.

*EGMS III, Provision of Security Printed Revenue Stamps and Integrated Production Accounting System tender number KRA/HQS/DP/423/2014-2015*

3.2.40 The Cabinet Secretary in charge of the National Treasury issued Legal Notice No. 110 of 18 June 2013, (EGMS) Regulations that expanded the scope of the system so as to cover all excisable goods except motor vehicles.

3.2.41 Consequently, KRA formally expressed its interest to terminate its existing contract with SICPA Security Solution SA for Printing, Supply and Delivery of Security Revenue Stamps complete with Track and Trace System and Integrated Production Accounting system.

3.2.42 KRA initiated a negotiation processes with SICPA Security Solution SA for the Provision of Security Printed Revenue Stamps and Integrated Production Accounting, thus deemed a direct procurement for a solution provider to cover the expanded scope as per Legal Notice No. 110 of 18 June 2013.

3.2.43 On 15 May 2015, the tender committee approved the use of Direct Procurement method for procurement of a contractor for Provision of Security Printed Revenue Stamps and Integrated Production Accounting system for the expanded scope.

3.2.44 However, Section 74 of the PPD Act, 2005 allows Procuring Entities to use direct procurement if the following are satisfied: (a) There is an urgent need for the goods, works or services being procured, (b) Because of the urgency the other available methods of procurement are impractical; and (c) The circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity.

3.2.45 The Tender Committee cited the existence of proprietary software that had been procured under the contract dated December 2012 as a rationale for engaging in direct negotiations with SICPA Securities Solutions SA. Accordingly, an alternative supplier would have meant compelling manufacturing businesses to install a parallel software which would not be cost effective for the manufacturers and eventually costly for consumers.



- 3.2.46 The negotiation committee comprised of Mr. Caxton M. Ngeywo, Mr. Hargwings Omondi, Mr. Jeremiah Kinyua, Ms. Betty Kimeu and Ms. Jane Macharia Chege. Various negotiations meetings were held between 7 January and 15 January 2015. SICPA Solution SA was represented by Mr. Bruno Frentzel, Mr. Giovanni Zucchetti, Mr. Matthieu Cousteau, Mr. Christopher York, Mr. Brian Ligale and Mr. Christopher Essendi. The negotiation meeting agreed on a reduction of the initial offer price of Euro 13.61 per 1,000 stamps (exclusive of VAT) to Euro 13.25 per 1,000 stamps (exclusive of VAT) being an aggregated usage fee for:
- The stamp (On paper or digital code on the product);
  - The service for Track & Trace computerized system; and
  - The integrated production accounting system.
- 3.2.47 On 15 May 2015, the KRA tender committee awarded the tender for provision of Security Printed Revenue Stamps and Integrated Production to SICPA Security Solution SA, at a contract sum of a minimum of Kshs.15,909,293,482 (Euros.158,213,898) and a maximum of Kshs.17,156,333,818 (Euros.170,615,399) for five (5) years. The committee comprised Ms. Alice Owuor - Commissioner (Chairperson), Mr. Josephat Omondi, Mr. P. Nyaga, Ms. W. G. Ng'ang'a and Mr. Ezekiel K. Saina.
- 3.2.48 On 21 July 2015, the KRA sought clarification from the Public Procurement Oversight Authority (PPOA) via letter REF: KRA/5/PSS13/2/10 of the Direct Procurement.
- 3.2.49 KRA also wrote to Solicitor-General vide letter ref KRA/5/BS12/8/C/78 on the 24 June 2015 to request for a review of the notification of award and draft contract. The Solicitor-General responded vide letter ref AG/CONF/2/6/61 VOL VIII (34) dated 1 July 2015 advising that KRA adheres PPDA, 2005 and that the draft contract was in order.
- 3.2.50 On 30 October 2015, the KRA and SICPA Security Solutions SA signed a contract for the provision of Security Printed Revenue Stamps and Integrated Production Accounting to SICPA Security Solution SA at a contract sum of a minimum Kshs.15,909,293,482 and a maximum of Kshs.17,156,333,818 for five (5) years. Appendix VIII details the provisions of the contract.

3.2.51 As at the time of the special audit, KRA had paid a total of Kshs.1,348,411,653 to SICPA Security Solutions SA for this contract as summarized below and detailed in Appendix IX :

Table 10 : Payments made by KRA to SICPA for EGMS III

	Item	Amount paid
1	Stamps	1,341,683,653
2	Track and trace	-
3	Installation and maintenance	6,728,000
	Total (Kshs)	1,348,411,653
	Total (Euros)-1 Euro= Kshs.115	11,725,319

The following payments relating to EGMS III appear in SICPA SAs records as having been paid by KRA but are not reflected in KRA records as payments to SICPA SA.

Date	Amount (Euros)
10.02.2017	48,508.72
10.02.2017	1,852,647.88
20.03.2017	1,130,831.24
05.05.2017	1,755,055.58
08.05.2017	582,294.12
09.05.2017	1,496,637.53
	6,865,975.07

### 3.3 Statutory and Legal Provisions

3.3.1 The Statutory Instruments Act, 2013 defines statutory instrument as any rule, order, regulation, direction, tariff of costs or fees, letters, patents, commission, warrant or proclamation by law made or established in the execution of a power conferred by an Act of parliament. Legal and Gazette Notices issued by various Government entities from time to time are therefore classified as statutory instruments.

3.3.2 The Act provides for making, scrutiny, publication and operation of Statutory Instruments in Kenya. It was assented to on 14 January 2013 with a commencement date of 25 January 2013. Part IV of the Act provides for Parliamentary scrutiny of statutory instruments as follows:

Table 11B : Statutory Instruments Act, 2013

Section	Legal provision
5	Requires regulation-making authority to make appropriate consultations with persons who are likely to be affected by the proposed instrument before issuing the statutory instruments and in particular where the proposed statutory instrument is likely to have a direct, or a substantial indirect effect on business; or restrict competition.
11(1)	Every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before Parliament.
11(3)	The responsible Clerk shall register or cause to be registered every statutory instrument transmitted to the respective House for tabling or laying
11(4)	If a copy of a statutory instrument that is required to be laid before Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void.

3.3.3 On 18 June 2013, the Cabinet Secretary to the National Treasury issued Legal Notice No. 110 (LN 110) "The customs and excise (Excisable Goods Management System) Regulations that made the following provisions:

Table 12 : Legal Notice 110 of 18 June, 2013

Section	Legal provision
3	Every package of excisable goods, except motor vehicle, manufactured in or imported into Kenya to be affixed with an excise stamp of a type and in a manner
5(1)(2)	Manufactures or importers shall purchase excise stamps from KRA at prescribed fee that should not exceed the cost of stamp and maintenance fee
9(1)	Subject to the law regulating procurement, KRA to appoint a suitable person to print and deliver excise stamps, and develop and install Excise Goods Management System (EGMS)
10(1)	The Commissioner may, where necessary and subject to such conditions as he may impose, require the printer to deliver excise stamps directly to a manufacturer
16	Manufactures and importers of excisable goods to facilitate installation of EGMS in their production or import facilities.

3.3.4 Pursuant to Section 5 of the Legal Notice No. 110, on 05 September 2013, the Commissioner-General of the Kenya Revenue Authority issued another statutory instrument, Gazette Notice Number 12856 that prescribed the price of an exercise stamp to be one shilling and fifty cents (Kshs.1.50).

3.3.5 As earlier mentioned both of these statutory instruments ought to have been submitted to Parliament for scrutiny as provided for in Part IV of the Statutory Instrument Act, 2013.

- 3.3.6 On 08 March 2017, the special audit team held a meeting with Parliamentary Officers with a view to confirm whether or not the instruments were submitted to Parliament for scrutiny as required by law.
- 3.3.7 During the meeting, we were informed that there is no evidence in the records at Parliament for Legal Notice No.110 of 18 June 2013 and Gazette Notice No.12856 of September 2013. This indicates that they were never submitted by the Cabinet Secretary, National Treasury and /or Commissioner-General of KRA for Parliament for scrutiny as provided in the Statutory Instrument Act of 2013.
- 3.3.8 The special audit reviewed the statutory Instrument register maintained at the National Assembly and established that it had no record of the two instruments having been submitted to Parliament contrary to Section 11(1) of the statutory instruments act, 2013.
- 3.3.9 KRA prescribed a fee of one shilling and fifty cents (Kshs.1.50) in the Gazette Notice No. 12856 Pursuant to section 11(4) of the Statutory Instruments Act, 2013. Prior to implementation of the Legal Notice No.110 and Gazette Notice No. 12856, the KRA used to charge a fee of one shilling (Kshs.1.00).
- 3.3.10 Further, there was no evidence of consultations between KRA/National Treasury with manufacturers and importers who were affected by the proposed and implemented instrument even before issuing the statutory instruments contrary to section five (5) of the Statutory Instruments Act, 2013 and Article 201 of the Constitution of Kenya 2010 that requires government entities to ensure public participation in financial matters.

#### **3.4 Financial implication of implementing the system on cost of production**

- 3.4.1 The special audit sought evidence from a total of seventeen (17) firms comprising both importers and manufactures that had implemented the EGMS through interviews to establish the financial implication of the EGMS on the cost of excisable consumer goods and whether the system was double taxing manufactures/importers.
- 3.4.2 Only five (5) firms responded by giving data on the financial implication of implementing the EGMS as detailed under Appendix X. Out of these five respondents, the special audit established that both manufacturers and importers of excisable

consumer goods had incurred additional costs on installation of the EGMS system as detailed below:

Table 13 : Incremental costs incurred by Manufacturers /Importers as a results of EGMS

	Firm	Category	Incremental cost (KSh)	Narration
1	Heineken	Importer beer	819,929	Additional amount incurred per container in relation to transport to and from warehouse, costs of affixing stamps, costs of breakages and repackaging
2	East Africa Breweries	Manufacturer of beer	402,862,165	Costs incurred on application and installations of lines, additional equipment, staff and security expert costs
3	African Spirits	Manufacturer of Spirits	10,240,483	Fiber trunking and accessories costs
4	Mt. Kenya Breweries	Manufacturer of Beer	41,509,000	Purchase and installation of a new production line,
5	Mashwa industries	Manufacturer of wines and spirits	1,550,000	Cost of top Labelling Machine, extra processing brush units and control box

3.4.3 Though the above costs had resulted in an increase in the costs of production, the manufactures/importers had absorbed the costs within their profit margins instead of transferring the costs to the consumers for fear of losing on the market share. However, the accuracy of this incremental cost were not a subject of these special audit.

3.4.4 Manufacturers and importers interviewed raised the following specific concerns on the manner in which the EGMS had been implemented:

- None of the respondent importers or manufacturers confirmed having received a notice of installation from the Commissioner-General of KRA in writing advising on the date of installation of the system. This contravened Section 22 (1) of the Legal Notice 110.
- The lengthy process of applying and acquiring the stamps. This takes long due to the many approval levels required before one can pay for and pick the stamps. This affects the running of businesses because they cannot sell the products without affixed stamps. No actual evidence was provided as to number of days these respondents had experienced delays that had an effect on their stock turnovers.
- The increased cost of stamps by Kshs.0.50 which most of the industry players have opted to absorb as part of their production cost. Prior to introduction of the EGMS, the importers were paying Kshs.1.00 per stamp, with the introduction of EGMS the cost of stamp changed to Kshs.1.50 per stamp.
- The introduction of EGMS has not reduced the levels of counterfeiting of products as initially envisaged according to the respondents. This however requires the intervention of several agencies of government to curb.
- In one instance, a manufacturer claimed the EGMS did not provide for real time activation of stamps thereby breeding inefficiency.
- Stamps can get spoilt, is rejected or even wasted during the application process or quality control checks, yet there is no refund system for the same with the KRA. This leads to additional costs for the manufacturers inform of wasted stamps.
- In addition to the KRA, the Kenya Bureau of Standards and Anti-Counterfeit Agencies (ACA) had set up multiple authentication systems which resulted in increase in the cost of doing business.

3.4.5 Among the manufactures/importers interviewed, none of them availed any evidence to indicate that the introduction of EGMS had resulted in double taxation of the manufactures/importers.

### 3.5 Value for Money

- 3.5.1 Value for money auditing examines whether public institutions or government programs have attained effectiveness, economy and efficiency in the management of resources at their disposal.
- 3.5.2 Effectiveness is the extent to which objectives have been achieved and the relationship between the intended and actual impacts of activities. The objective of establishing the EGMS was to bring in more excise tax payers to increase tax collections by KRA that had been threatened by counterfeiting of stamps and manufacturers under declaring volumes of their products.
- 3.5.3 A review of data from KRA established that as a results of implementation of EGMS in the year 2010, together with relevant statutory instruments introduced in 2013, there has been a significant increase in amounts of excise duty collected by KRA on cigarettes, spirits and wines from ten percent (10%) in 2011/2012 to forty three (43%) in 2015/2016 as follows:

Table 14 : Growth in excise duty collections in Cigarettes, Spirits and Wines

Year	Amounts collected (KSh)	% growth
2010/2011	10,225,749,044	-
2011/2012	11,283,981,517	10
2012/2013	12,671,281,273	12
2013/2014	14,537,054,946	15
2014/2015	16,189,504,929	11
2015/2016	23,093,194,792	43

- 3.5.4 From the above growth in revenue collections, it can be concluded that implementation of the EGMS and the statutory instruments achieved effectiveness as they jointly resulted in growth in excise tax collections.



- 3.5.5 From the documents review and interviews conducted, the special audit noted that the current EGMS contract between KRA and SICPA Security Solutions SA was not procured through competitive bidding process. However, there was evidence that SICPA Security Solutions SA was an industry leader in the provision of authentication solution and revenue protection solutions. Further, it was noted that the company provides these solutions to various governments and its agencies in many countries including; Brazil, Turkey, Albania, Morocco, Malaysia and the State of California, USA.
- 3.5.6 In this regard, the special audit concluded that whereas the acquisition of EGMS by KRA realized effectiveness, there was no evidence to prove that the process either realized or did not realize efficiency and economy as measures of value for money.

4 APPENDICES

ANNEX 4 – SPECIAL  
TENDER COMMITTEE  
MINUTES OF 15<sup>TH</sup>  
MAY, 2015



# KENYA REVENUE AUTHORITY

ISO 9001:2008 CERTIFIED

MINUTES OF THE 27TH SPECIAL TENDER COMMITTEE MEETING HELD ON  
15<sup>TH</sup> MAY, 2015 KRA BOARDROOM, 30<sup>TH</sup> FLOOR, TIMES TOWER BUILDING

## PRESENT:

1. Ms. Alice Owuor - Commissioner of DTD (Chairman)
2. Mr. Josephat Omondi - Deputy Commissioner - Finance (Vice Chairman)
3. Mr. P. Nyaga - Deputy Commissioner - LTO
4. Ms. W. G. Ng'ang'a - Deputy Commissioner - Legal Services & Board Coordination
5. Mr. Ezekiel K. Saina - Deputy Commissioner - Information & Communication Technology

## ABSENT WITH APOLOGY

1. Mr. Julius Musyoki - Ag. Commissioner - Customs & Border Control
2. Mrs. L. M. Malinda - Deputy Commissioner - Human Resources

## IN ATTENDANCE

1. Mrs. Grace Murichu-Kariuki - Ag. Deputy Commissioner - Procurement and Supplies Services (Secretary).
2. Ms. Faith Muasya - Supervisor - Procurement and Supplies Services (Taking Notes).
3. Mr. George Ombaso Mogaka - Chief Manager - Legal Services and Board Coordination.

4. Mr. John W. Karimi

Ag. Deputy Commissioner  
Administration & Logistics.

MINUTE 1/27SP/2015 COMMENCEMENT OF THE MEETING

The Chairman called the meeting to order at 8:50a.m.

MINUTE 2/27SP/2015 SUPPLY, DELIVERY, INSTALLATION, TESTING AND COMMISSIONING OF iBOARD SYSTEM - KRA/HQS/NCB-019/2014-2015

The Secretary presented a proposal for procurement of services for Supply, Delivery, Installation, Testing and Commissioning of iBoard System.

The system will help in automation of the current manual processes. The Software will achieve the following objectives:

- Achieve convenience in data capture, retrieval, storage and reporting.
- Create efficiency and effectiveness in Business processes.
- Raise Performance standards for the Department and the staff through monitoring of activities both at individual and departmental level.
- Enable enforcement of statutory requirements and internal standards.

Procurement was done through Open Tender advertised in the Daily Nation and Standard Newspapers on 6<sup>th</sup> January, 2015 and closed on 25<sup>th</sup> February, 2015. The following three (3) firms responded:

1. Software Technologies Limited.
2. Attain Enterprise Solutions Limited.
3. Coseke (K) Limited.

The bids were evaluated based on the following criteria:

- Tender Responsiveness.
- Technical Evaluation.
- Financial Evaluation.

A Summary of the Tender Responsiveness for the three (3) bids is depicted in table 1 below:

Table 1: Summary Scores of bidders Responsiveness

	Description of Criteria	Bidders		
		1	2	3
1	<b>Submission of Tender Documents</b>			
	<ul style="list-style-type: none"> <li>• Two envelope bid</li> <li>• Tender Security</li> </ul>	✓	✓	✓
	<ul style="list-style-type: none"> <li>• Power of Attorney</li> </ul>	✓	✓	✓
2	<b>Company Profile</b>	✓	X	✓
	<ul style="list-style-type: none"> <li>• Attach copy of Certificate of Incorporation</li> <li>• Confidential Business Questionnaire</li> </ul>	✓	✓	✓
	<ul style="list-style-type: none"> <li>• Copy of Trade License or Business Permit</li> </ul>	✓	✓	✓
	<ul style="list-style-type: none"> <li>• manufacturer's Authorizations for software and its key components</li> </ul>	✓	✓	✓
3	<b>Managerial and Key Personnel Competency Profiles</b>	✓	X	✓
	<ul style="list-style-type: none"> <li>Attach:             <ul style="list-style-type: none"> <li>• Organization chart</li> <li>• Key Staff Competency Profiles.</li> </ul> </li> </ul>	✓	✓	✓
4	<b>Financial Resources</b>	✓	✓	✓
	<ul style="list-style-type: none"> <li>Submit             <ul style="list-style-type: none"> <li>• Last 3 years Audited Accounts</li> </ul> </li> </ul>	✓	✓	✓

5	<p align="center"><b>Physical Facilities</b></p> <p>Physical Address:  <ul style="list-style-type: none"> <li>State if owned or leased and attach copy of title or lease documents and latest utility bill.</li> <li>Equipment and other resources related to the procurement item.</li> </ul> </p>	✓	✓	✓
6	<p align="center"><b>Experience</b></p> <p>State number of years of experience in the procurement item.</p>	✓	✓	✓
7	<p align="center"><b>Reputation</b></p> <p>Submit letters of reference from 3 major clients, which should include summary of services rendered for a similar security project, value of contracts and contact person, address and telephone numbers</p>	✓	✓	✓
8	<p align="center"><b>Social Obligations</b></p> <p>Submit certificate of compliance for the following:  <ul style="list-style-type: none"> <li>Tax Compliance</li> </ul> </p>	✓	✓	✓
	<b>Remarks</b>	Pass	Fail	Pass

Bidder Nos. 1 and 3 met the tender responsiveness and were therefore recommended for further evaluation.

A Summary of the Vendor Evaluation for Bid Nos. 1 and 3 who met the tender responsive criteria are depicted in table 2 below:

Table 2. Summary of Vendor Evaluation Score Sheet

Description of Criteria	Scores		Bidders*	
	Maximum score	Cut off score	1	3
Company Profile	6	6	6	6
Suitability of Service Provider			2	2
• Tender Security (2Marks)			1	1
• Power of Attorney (1Mark)			1	1
• Attach copy of Certificate of Incorporation (1Mark)			1	1
• Confidential Business Questionnaire (1Mark)			1	1
• Copy of Trade License-Business Permit (1Mark)			1	1
Managerial and Key Personnel Competency Profiles	5	2	5	5
• Organizational Chart (2 Marks)			2	2
• Qualification of Key Staff and Capacity to deliver goods/service. Management and Technical Staff (3 Marks)				
Requirements for Key Staff:				
(a) Project Manager-Masters Degree, at least three (3) key projects handled, 3 years of experience			3	3
(b) Lead Developer/Resolution Officer in IT at least three (3) key projects handled, 3 years of experience				
(c) Developer/Analyst Bachelors Degree in IT at least three (3) key projects handled, 3 years of experience				
Financial Resources	3	3	3	3
Financial Ratios to be Evaluated:				
• Working Capital and Turnover ratio (5 Marks)				



<b>Physical Facilities</b> Proof of physical Address and Capacity to deliver goods/services State if owned or leased and attach copy of title or lease documents and latest utility bill. (2 Mark)	1	2	1	1
Equipment and other resources related to the procurement item (1 Mark)			1	1
<b>Experience</b> No. of Continuous Year of Service Required (One year experience (2 Mark))	5	2	5	5
Two years experience (3 Marks)				
Three years experience (4 Marks)				
Four years and over four years experience (5 Marks)				
<b>Reputation</b> Proof of Satisfactory Service Letters of reference from 3 major client, summary of services rendered, value of contracts and contact person, address and telephone numbers	5	4	5	4
<b>Social Obligations</b> Proof of having satisfied Key Social Obligations Tax Compliance (1 Mark)	1	1	1	1
<b>Total Score</b>	30	20	30	29

According to vendor evaluation in table 2 above bidder nos. 1 and 3 met the cut-off scores and were therefore recommended to proceed to the next stage of evaluation.

Table 3. Clause-by-Clause Technical evaluation Scores

1	Functional Requirements	Scores allocated	Bidder No 1	Bidder No 3
1.1	Meetings Module	4	2.98	3.18
1.2	Conveyance Module	8	8	7.73
1.3	Profiles and Swearing in Module	1	1.92	1.82
1.4	Bring Up (BU) Tracking Module	1	1.5	1.4
1.5	Administration Module	1	2.25	2.69
1.6	Reports Module	1	1.5	0.6
2	Non-Functional Requirements	3	2.7	1.69
3	Security Requirements	3	1.61	1.75
4	Training and Skills Transfer	1	2.57	0.86
5	Support and Maintenance	5	5	4.78
	<b>Cut-Off scores 30%</b>	40	12.03	0.5

Bid Nos. 1 and 3 met the cut off scores under clause by clause technical evaluation criteria and were therefore recommended for further evaluation.

The Financial proposals for bid Nos. 1 and 3 were opened on 13<sup>th</sup> March, 2015.

The Cost Schedule for Supply, Delivery, Installation, Testing and Commissioning of iBoard System are depicted in table 4, 5 and 6 below;

Table 4: Cost Schedule for bidder no. 1 (Software Technologies Limited) Option One

Sno	Feature	Qty	Bidder 1 Software Technologies Ltd Option 1 (On Premises)	
			Unit price inclusive of all Taxes (Kshs)	Total inclusive of all Taxes (Kshs)
1.0	Functional Requirements			
1.1	Meetings Module	1	10,306,688	10,306,688
1.2	Conveyance Module	1	3,538,000	3,538,000
1.3	Profiles and Swearing in Module	1	899,000	899,000
1.4	Bring Up (BU) Tracking Module	1	649,948	649,948
1.5	Administration Module	1	Included	Included
1.6	Reports Module	1	Included	Included
2.0	Non-Functional Requirements	1	Included	Included
3.0	Security Requirements	1	Included	Included
4.0	Training and Skills Transfer	1	148,920	148,920
	Subtotal for License and Implementation		15,842,168	15,842,168
5.0	Support and Maintenance			
	Meetings Module	1	1,194,457	1,194,457
	Conveyance Module	1	513,010	513,010
	Profiles and Swearing in Module	1	140,355	140,355
	Bring Up (BU) Tracking Module	1	94,242	94,242
	Administration Module	1	Included	Included
	Reports Module	1	Included	Included
	Non-Functional Requirements	1	Included	Included
	Security Requirements	1	Included	Included
	Subtotal for Annual Support		2,232,064	2,232,064
	Grand Total		18,074,532	18,074,532

Table 5: Cost Schedule for bidder no. 1 (Software Technologies Limited) Option Two

Feature	Qty	Bidder 1 Software Technologies Ltd Option 2 (Software as a Service)	
		Unit price inclusive of all Taxes (Kshs)	Total inclusive of all Taxes (Kshs)
Functional Requirements			
Meetings Module			
Subscription Cost	10 users per month	7,106,181.00	296,240.00
Setup and Training Cost	1 lump sum	1,902,960.00	1,902,960.00
Conveyance Module			
Subscription Cost	20 users per month	1,909.00	98,182.00
Setup and Training Cost	1 lump sum	1,187,360.00	1,187,360.00
Swearing-in module			
Subscription Cost	20 users per month	2,134.00	12,688.00
Setup and Training Cost	1 lump sum	1,280,640.00	1,280,640.00
Bring-up(BU) Module			
Subscription Cost	20 users per month	2,134.00	12,688.00
Setup and Training Cost	1 lump sum	960,480.00	960,480.00
Total One-Time Cost			5,549,440.00
Total Recurring Cost(per month)			179,798.00
Total Cost for the first year			11,307,020.800
Total Cost for second year onwards			5,757,58.00

Table 6: Cost Schedule for bidder no. 3 (Coseke (K) Limited)

Sno	Feature	Qty	Bidder 3 Coseke (K) Ltd Software as a Service	
			Unit price inclusive of all Taxes (Kshs)	Total inclusive of all Taxes (Kshs)
1.0	Functional Requirements			
1.1	Meetings Module			
1.2	Conveyance Module	1	500,000.00	500,000.00
1.3	Profiles and Swearing in Module	1	180,000.00	180,000.00
1.4	Bring Up (BU) Tracking Module	1	500,000.00	500,000.00
1.5	Administration Module	1	480,000.00	480,000.00
1.6	Reports Module	1	480,000.00	480,000.00
2.0	Non-Functional Requirements	1	500,000.00	500,000.00
3.0	Security Requirements	1	450,000.00	450,000.00
4.0	Training and Skills Transfer	1	450,000.00	450,000.00
	Subtotal for License and Implementation		300,000.00	300,000.00
5.0	Support and Maintenance 1 <sup>st</sup> Year			
	Grand Total		300,000.00	300,000.00
	Subsequent Annual Charges(2 <sup>nd</sup> Year Onwards			5,540,000.00
	Annual Cost per additional user			2,900,000.00
				USD .450 Approx Kshs.40,500.00

Table 7: Analysis of Cost of Ownership for the Software for five (5) years

Item Description	Bidder 1 Software Technologies Ltd Option 2(Software as a Service)	Bidder 3 Coseke (K) Ltd Software as a Service
	One time cost	
Annual cost for Year 1	5,549,000.00	5,540,000.00
Subsequent Annual Cost for Year 2 onwards	5,757,581.00	2,900,000.00
Annual Cost for Year 3		2,900,000.00
Annual Cost for Year 4	5,757,581.00	2,900,000.00
Annual Cost for Year 5	5,757,581.00	2,900,000.00
Total Cost of five (5) Yrs	34,337,344.00	17,140,000.00
Cost per additional user per module per year		
Meeting Module	38,872.00	
Conveyance Module		USD .450 Per User (Equivalent Kshs.40,500) Exchange Rate:Kshs.90.00
Profiles and Swearing in Module	38,908.00	
Bring up module	25,608.00	

A summary of the combined overall scores for Tender Responsiveness, Vendor Evaluation, Technical Evaluation and Financial Scores for the qualified bidders are depicted in table 8 below:

Table 8: Summary of Overall Weighted Scores

BIDDER NO	Bidder 1 Software Technologies Limited)	Bidder 3 Coseke (K) Limited
QUOTED FINANCIAL FINANCIAL SCORES	11,307,020.80	5,540,000.00
TENDER RESPONSIVENESS	11.20	00
VENDOR EVALUATION	Met	Met
TECHNICAL SPECIFICATIONS	30	29
TOTAL SCORES	12.01	29.5
OVERALL RANKING	1	2
RECOMMENDATION	Recommended	Not Recommended

The Evaluation Committee further carried out a post qualification evaluation to establish the functionality of other modules and to carry out a due diligence on the reference sites provided by bidder's to determine the requisite financial and production capabilities as provided for in section 2.27 of the tender document.

The Evaluation Committee established the following;

1. The set up cost was comparable for both bids. Software Technologies Limited was Kshs.5,549,000.00 and Coseke Kenya Limited was Kshs.5,540,00.00.
2. There was a large variation on the annual cost for bid No.1 (Software Technologies Limited) was Kshs.5,757,581.00 and for bid No. 3 (Coseke Kenya Limited) was Kshs.2,900,000.00 and which also depends on the number of users per module.
3. Features for the meeting module for bid No.1 (Software Technologies Limited) had extra features like Evaluation, Compliance and Approval/Voting compared to bid No.3 (Coseke Kenya Limited).
- 4 Bid No 3 (Coseke Kenya Limited) is a re-seller of the software while bid No.1 (Software Technologies Limited) is the software developer owning the system copyright.
5. The referenced sites for bid No. 1, Kenya Power & Lighting

Limited and Capital Markets Authority responded positively. However, the referenced sites for bid No.3 did not respond.

The following recommendation was made by the Procurement Unit:

The committee recommend award of Contract to Software Technologies Ltd for the Supply, Delivery, Installation, Testing and Commissioning of iBoard System (On Premises Option) at onetime set up cost of Kshs.15,842,468.00 and annual support and maintenance one year after the start of the project at a annual cost of Kshs.2,232,064.

Documents were presented for Members' perusal.

*After deliberations, the Committee awarded the contract as recommended by the Procurement Unit and directed that the Procurement and Disposal & Information and Communication Technology Oversight Committee be notified of the award.*

MINUTE 3/27SP/2015

EXCISABLE GOODS MANAGEMENT SYSTEM (PRINTING, SUPPLY AND DELIVERY OF SECURITY REVENUE STAMPS COMPLETE WITH TRACK AND TRACE SYSTEM, AND INTEGRATED PRODUCTION ACCOUNTING SYSTEM) - KRA/HQS/DP-423 /2014-2015

The Secretary presented a proposal for Printing, Supply and Delivery of Security Revenue Stamps complete with Track and Trace system, and Integrated Production Accounting System.

The existing Contract for Printing, Supply and Delivery of Security Revenue Stamps complete with Track and Trace system, and Integrated Production Accounting System for a period of five (5) years was awarded SICPA Security Solutions SA 14<sup>th</sup> December, 2012. The Contract was signed 18<sup>th</sup> April, 2013 for five (5) years, effectively ending on March, 2019 since Module II was effective on the Go Live date on 28<sup>th</sup> February, 2014 and was to last for five years. The Contract price was reviewed by Tender Committee on 16<sup>th</sup> April, 2013 so as separate the 16% VAT which was thereafter paid by the Authority and supplier would invoice less.

The current contract is implemented on three (3) products (Tobacco, Wines and Spirits) with more than 850 million stamps delivered to date, with twenty eight(28) production lines equipped with automated production accounting and thirty three (33) automated production accounting lines. The Government amended its Excisable regulations vide Legal Notice No. 110 of 18<sup>th</sup> June, 2013 (Excisable Goods Management System) Regulations that expanded the scope of the system to cover all excisable goods except Motor vehicles. These Regulations came after the contract was signed on Contract was signed 18<sup>th</sup> April, 2013.

The current contract cannot be applied to cover the new products because of the following reasons;

- The current contract was for 3.55 billion stamps whereas the extended scope is estimated to have 12,876,633,889 as the maximum number of stamps.

• It did not cover all excisable goods except Motor vehicles as provided for in the Legal Notice. It only covered three (3) products (Tobacco, Wines and Spirits).

• Since the cost of the project is amortized over the contract period, using the current contract on the extended scope would amount to amortizing the cost within the remaining period estimated at three and half (3 1/2) years and this would result in higher unit costs and consequently funding constraints.

• The current cost limits the number of production line equipment. Any additional line generates an additional cost which is not sustainable.

Any variation to the contract so as to include the extended scope is likely to be over the allowed 25% cumulative variation of a contract.

Procurement was done through Direct Procurement. The previous two tendering processes had yielded only one suitable bid, SICPA Security Solutions and pursuant to Section 74(2) (b) of the Public Procurement and Disposal Act, 2005 which provides that "A procuring entity may use direct procurement if it is satisfied there is no reasonable alternative or substitute for the goods, works or services". SICPA Security Solutions SA is the current supplier for Printing, Supply and Delivery of Security Revenue Stamps complete with Track and Trace system, and Integrated Production Accounting System and has been contracted to provide the services for a period of five (5) years. The price for the Stamp, Track and Trace as well as the

Production Accounting System was based on a five year contract so as to be economically viable.

A summary of the final offer from SICPA Security Solutions SA after negotiation was as follows:

The revised offer from SICPA was EUR 13.25 per 1,000 stamps excluding VAT being an Aggregated usage fee for:

- i. The Stamp (on paper or digital code on the product),
- ii. The Service for Track & Trace computerized system, including a total up to 250 handheld terminals for KRA officers (90 additional to the 160 already delivered) and 10,000 VA11 cards for authentication by manufacturers, distributors, retailers and importers (already delivered) and,
- iii. The Integrated production accounting system fee, including a total of 33 revenue stamps activation equipments for importers (already delivered) but without limitation to the number of production line monitoring equipments)

In addition SICPA's committed to provide:

- i. 2D code to be printed on a new generation of stamps to enable activation and verification with Smart Devices (Smartphones and Tablets). New generation of stamps to be implemented upon full consumption of existing stamps stocked at both KRA (2 months stock estimate) and SICPA (3 months stock estimate).
- ii. Development and deployment of an application allowing activation with Smart Devices within 150 calendar days after signature of the Addendum for the expansion of the EGMS Platform.



- iii. Development and deployment of an application for Smart Devices to enable public verification of the stamp and the products.
- iv. Deployment of enhanced Line Monitoring System with the implementation of online cameras allowing detection of undeclared production.
- v. Equipment and software allowing online check of tax status of tax payers by KRA enforcement officers. The purpose of this application is to collect and display information from EGMS, iTax and Customs Management System. Provide 250 Smart Devices incorporating this software.
- vi. Training and skills development on EGMS Platform (including ICT), SICPA offered to provide the following training:
  - a) Advanced Project Management,
  - b) Field Enforcement strategies and tactics,
  - c) Business Intelligence Report and Analysis,
  - d) Combating illicit trade,
  - e) Laboratory Forensic,
  - f) Any other subject jointly agreed.
- vii. Workshops and training on quarterly basis for KRA managers and officers (workshop subjects to be jointly agreed), with a maximum of 600 trainee man-days per annum (excluding travel and hospitality costs).
  - a) One (1) training per year organized by SICPA overseas for a total 5 KRA officers on topics to be jointly agreed by KRA and SICPA.

- viii. SICPA to progressively upgrade the current generation of handheld terminals for KRA officers towards a new generation of readers.
- ix. The new price model proposed as of GO LIVE Date of at least two new product categories included in the EGMS Platform (currently targeted for August 15, 2015 as per attached implementation plan).
- x. The new term proposed is 5 years as of GO LIVE of at least two new product categories included in the EGMS Platform.
- xi. SICPA's Excellence Centre in Kenya with:
- A Coding Centre upon reaching an annual volume of 1 billion stamps to be delivered in reels to manufacturers and importers,
  - A Solution Development Centre,
  - A Customer Support and Training Centre for Kenya and the East African Region.

Summary of the proposal from SICPA Security Solutions SA.

No	Current Contract	Proposed	Comments
1.	Supply of Security Printed Stamps during the five (5) year period at a unit cost of Euro 0.00572.	Supply of Security Printed Stampcodes during the five (5) year period at an aggregated unit cost of Euro 0.01325	<ul style="list-style-type: none"> <li>• The five year term for the current contract commenced in 18<sup>th</sup> April, 2013 and was to end in 17<sup>th</sup> April, 2018. The pricing model is changed to aggregated fee for stamp, track and trace system and the Production accounting system.</li> </ul>
2.	Supply of Stamp Track and Trace System at a cost of Euro 10,450,000.00, for a period five (5) year period at the rate of Euro 2,090,000.00 per annum.	Aggregated in the Stamp	<ol style="list-style-type: none"> <li>1. Current pricing scheme retained for base calculation</li> <li>2. Risks to be transferred to SICPA <ul style="list-style-type: none"> <li>• Line proliferation risk</li> <li>• Packaging Content risk</li> <li>• Change in consumption</li> <li>• Economic risk (i.e. inflation, price variation local costs)</li> </ul> </li> </ol>
3.	Supply of Production Accounting System at a total cost of Euro 11,650,000.00 for a period for five (5) years.	Aggregated in the Stamp	<ol style="list-style-type: none"> <li>3. The aggregated cost considered the growth in volumes of stamps</li> </ol>
<p>Additional Technology</p> <ul style="list-style-type: none"> <li>• New Stamps with 2D bar code and codes for other products.</li> </ul>			

	<ul style="list-style-type: none"> <li>• Ninety (90) additional handheld devices.</li> <li>• Two hundred and fifty (250) smart devices for verification.</li> <li>• Online cameras for production line systems.</li> <li>• Development and deployment of an application allowing activation with Smart Devices within 150 calendar days after signature of the Addendum for the expansion of the FGMS Platform.</li> <li>• Integration with other tax systems (Tax and Customs Management System).</li> <li>• Specific Framing in: <ul style="list-style-type: none"> <li>i. Advanced Project Management.</li> <li>ii. Field Enforcement strategies and tactics.</li> <li>iii. Business Intelligence Report and Analysis.</li> <li>iv. Combating illicit trade.</li> <li>v. Laboratory Forensic.</li> </ul> </li> </ul>
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The following recommendation was made by the Procurement Unit:

1. Termination of the current contract with SICPA Security Solution SA
2. Use of Direct procurement method as provided for by Section 74(2) (b) of the Public Procurement and Disposal Act 2005.
3. Award of contract to SICPA Security Solution SA at a minimum estimated cost of Euros 158,213,898 (Equivalent to Kshs. 15,909,293,482) for a period of five years commencing immediately on termination of the current contract so as to accommodate an aggregated usage stamp fee of EUR 13.25 per 1'000 with the following components:
  - i. The Stamp (on paper or digital code on the product),
  - ii. The Service for Track & Trace computerized system, including a total up to 250 handheld terminals for KRA officers (90 additional to the 160 already delivered) and 10'000 VAI1 cards for authentication by manufacturers, distributors, retailers and importers (already delivered)

- iii. The Integrated production accounting system fee, including a total of 33 revenue stamps activation equipments for importers (already delivered) but without limitation to the number of production line monitoring equipments).
- iv. Estimate of stamps / codes for five (5) years are as tabulated below;

Period	% Growth	Minimum	% Growth	Estimated Cost in Euros	Maximum	Estimated Cost in Euros
2015/2016		1,996,940,000			2,196,634,000	
	10%		9%	26,459,455		29,105,400
2016/2017		2,196,634,000			2,394,331,060	
	9%		8%	29,105,401		31,724,886
2017/2018		2,394,331,060			2,585,877,545	
	8%		7%	31,724,887		34,262,877
2018/2019		2,585,877,545			2,766,888,973	
	7%		6%	34,262,877		36,661,278
2019/2020		2,766,888,973			2,932,902,311	
				36,661,279		38,860,955
TOTAL (EUR)				158,213,898		170,615,399
TOTAL (KSHS)				15,909,293,482		17,156,333,818

Documents were presented for Members' perusal.

*After deliberations, the Committee awarded the contract as recommended by the Procurement Unit and directed that the Procurement and Disposal & Information and Communication Technology Oversight Committee be notified of the award.*

MINUTE 4/27SP/2015 PROVISION OF SERVICING AND MAINTANANCE SERVICES FOR SEVEN (7) CONTAINERS INSPECTION SYSTEMS FOR A PERIOD OF TWO (2) YEARS. - KRA/HQS/DP-400/2014-2015

The Secretary presented a proposal for procurement of Services for Maintenance of Containers Inspection Systems at seven (7)

sites Countrywide for a period of two (2) years starting 1<sup>st</sup> June, 2015 to 31<sup>st</sup> May, 2017. The current contract expires on 31<sup>st</sup> May, 2015 following the three (3) months extension which was sought so as to facilitate negotiation of the new contract.

Procurement was done through Direct Procurement. Avic International Holding Corporation (formerly known as CATIC - China National Aero-Technology Import and Export Corporation) is the supplier of the Equipment to be maintained.

A summary of the cost is depicted in the table below:

No.	Item Description	Models	Site	Qty	Avic International Holding Corporation
					Total Cost (USD)
1	Maintenance of Containers Inspection Systems at seven (7) sites Countrywide for a period of Two (2) years with starting 1 <sup>st</sup> June, 2015 to 31 <sup>st</sup> May, 2017 as follows;	PB2028	JKIA Nairobi Cargo Centre	1	US \$.2,917,215.00
		PB2028	Moi Airport Mombasa	1	
		PB2028	Eldoret Airport	1	
		MB1215HL	ICD Embakasi	1	
		MB1215HL	MCT11, Mombasa	1	
		MT121It	Consolbase CFS Mombasa	1	
		MB1215HS	Kilindini Port, Mombasa	1	
					US \$.2,917,215.00

The following recommendation was made by the Procurement Unit:

- Use of Direct Procurement:
- Award of Contract for Maintenance Service for Containers Inspection Systems at seven (7) sites Countrywide to Avic International Holding Corporation for a period of Two (2) years starting 1<sup>st</sup> June, 2015 to 31<sup>st</sup> May, 2017 at a total cost of US\$.2,917,215.00.

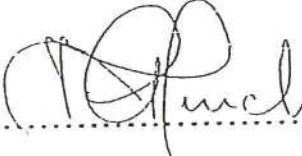
Documents were presented for Members' perusal.


*After deliberations, the Committee awarded the contract as recommended by the Procurement Unit and directed that the Procurement and Disposal & Information and Communication Technology Oversight Committee be notified of the award.*

MINUTE 5/27SP/2015: NEXT MEETING

The date of the next scheduled meeting was confirmed as 19<sup>th</sup> May, 2015.

The meeting ended at 10.45a.m.

SECRETARY..........DATE.....22/07/2015

CHAIRMAN..........DATE.....22/07/2015

# ANNEX 5 – MINUTES OF THE NEGOTIATION TEAM







# KENYA REVENUE AUTHORITY

ISO 9001: 2008 CERTIFIED

MINUTES OF THE MEETING HELD BETWEEN SICPA AND KRA ON THE  
EXTENSION OF SCOPE FOR THE CONTRACT ON PRINTING, SUPPLY,  
DELIVERY OF SECURITY REVENUE STAMPS COMPLETE WITH  
TRACK AND TRACE SYSTEM AND INTEGRATED PRODUCTION  
SYSTEM HELD BETWEEN 7<sup>TH</sup> JANUARY- 15<sup>TH</sup> JANUARY, 2015

PRESENT:

A. KRA TEAM

- |                      |   |             |
|----------------------|---|-------------|
| 1. Mr. C. Masudi     | - | Chairman    |
| 2. Mr. H. Omondi     | - | Member      |
| 3. Betty Kimeu       | - | Member      |
| 4. Karambu Muthaura  | - | Member      |
| 5. Jeremiah Kiryua   | - | Member      |
| 6. Ms. Jane Chege    | - | Member      |
| 7. Mr. Ruben Kiprino | - | Secretariat |

B. SICPA TEAM

8. Mr. Bruno Frenzel
9. Mr. Giovanni Zicchetti
10. Mr. Matthieu Cousteau
11. Mr. Christopher York
12. Mr. Marcos Ponte Soares
13. Mr. Brian Ligale
14. Mr. Christopher Essendi

## MINUTES OF NEGOTIATION MEETING

The Meetings were held between 7<sup>th</sup> January, 2015 – 15<sup>th</sup> January, 2015.

The members of SICPA & KRA introduced themselves and agreed on the negotiation process and issues based on the current contract.

### Background

Day one 7<sup>th</sup> January, 2015

#### KRA's Position

1. The need for review of the price model arose from the Project Management Board meeting held 8<sup>th</sup> October, 2013. The Authority requested SICPA to accept to enter into negotiations in order to shift from the current itemized pricing model as per Contract to a new model based on price per stamp that would cover the full cost of the solutions and services as per contractual obligations. The change in the pricing model was due to the escalating costs in the contract that were related to increasing no. of equipment.
2. In response to the Authority's request SICPA provided proposal on 1st November, 2013. Before the start of the negotiation, KRA Proposed and SICPA agreed to base the negotiations on Proposal made by SICPA on November 1<sup>st</sup>, 2013. It was further agreed that the proposal was not binding to the Parties.
3. Further KRA asked SICPA to provide a volume discount arising from the extended scope of EGMS.

#### SICPA'S PROPOSAL – 1<sup>ST</sup> PROPOSAL

1. SICPA presented a new price model proposal that became the subject of the meetings held between 7<sup>th</sup> January, 2015 and 15<sup>th</sup> January, 2015.

The proposal was as follows:

4.1 The initial price offered by SICPA on January 7<sup>th</sup> 2015 of EUR 13.61 per 1'000 stamps excluding VAT being an aggregated usage fee for:

- a. The Stamp (on paper or digital code on the product),
- b. The Service for Track & Trace computerized system, including 160 handheld terminals for KRA officers (already delivered) and 10'000 VAT cards for authentication by manufacturers, distributors, retailers and importers (already delivered) and,

- e. The Integrated production accounting system fee, including a total of 33 revenue stamps activation equipments for importers (already delivered) but without limitation to the number of production line monitoring equipments

### KRA'S COUNTER PROPOSAL (1<sup>ST</sup> PROPOSAL)

The price model proposed being exclusive of VAT was considered in KRA's view that it was not competitive since it did not consider the following;

- (a) The expanded scope qualifies KRA for additional handheld terminals for KRA Inspectors, VAI1 cards for authentication by traders and should be included in the proposal.
- (b) KRA proposed that SICPA provides a discount for the additional business arising from the expanded scope of EGMS which includes Beer, Mineral water, Soft drinks and Cosmetics

### SICPA'S REVISED PROPOSAL (2<sup>ND</sup> PROPOSAL)

SICPA made a new Aggregated Price Proposal as follow:

Proposed new price per stamp 13.25 EUR/1'000 ex. VAT

SICPA'S Proposal was based on the current assumptions:

• current number of line assessment	40 lines
• Volume estimate	717.16 mo units per year
• Current scope equivalent fee per stamp	13.65 eur/'000 ex. Vat
• Extended scope risk assessment	
• Assessment of the potential risk impact	14.17%
• Assessment of the likelihood of the risk	47.71%
• Risk premium	6.76%
• PRICE PER STAMP	14.57 EUR/'000 ex. VAT
• Calculated Discount	9.05%

Proposed new price per stamp 13.25 EUR/1'000 ex. VAT

### Comparative Analysis

SICPA submitted a comparison of the proposal to the current cost of the contract computed as a cost of each stamp.

Current Price (no risk transfer, 44 lines) 13.74 EUR/'000 ex. VAT  
Original Submission JAN. 7<sup>th</sup> March 13.61 EUR/'000 ex. VAT  
Price including Extended Volume (no risk transfer) - 13.32 EUR/'000 ex. VAT

Price Under the Extended Scope (WITH risk transfer)- 14.22 EUR/'000 ex. VAT

In response to KRAs counter proposal SICPA agreed to provide new equipments under the following terms:

- 37 additional SAS 12 (for a total of 70 equipments),
- 300 additional SICPA mobile (for a total of 460 equipments)
- Unlimited SAS and SCL equipment
- 5 years contract duration

KRA Comments on the SICPA'S 2<sup>nd</sup> offer:

1. KRA provided additional information to SICPA (e.g. production volumes and lines ready for installation of SAS / SCL) so that it could be used by SICPA to reconsider a lower competitive price

KRA requested to include corrections in the analysis proposed by SICPA:

- *Assumptions- Exchange rate @ 110 Ksh/Euro*
- *Annual growth rate of volume at 10%*
- *Risk factor of 6.76%*
- *Volume Discount of 5.23%*

2. KRA commented that the SICPA Offer did not provide consideration for the equipment that the Authority would forgo in the offer. The Authority extrapolated the number of equipment that was supposed to be available as a result of increased volumes. SAS 12 required 94 pieces and SICPA mobile 450 devices.

3. The Authority requested to know the technology to be deployed with the proposed pricing model

4. KRA needed assurances regarding the presented Smartphone technology on the following functionalities

- Accuracy
- Speed
- Convenience
- Cost
- Network issues
- Shall allow effective control

#### SICPA'S FURTHER COMMENTS ON REVISED PROPOSAL (2<sup>ND</sup> PROPOSAL)

1. SAS 12 were only deployed in Kenya and Massachusset for semi automated tobacco production lines.
2. SICPA proposed to offer an application allowing the use of Smartphone to activate stamps and possibly replace the SAS 12. SICPA submitted that the new technology is better than the existing SAS12 solution as it would provide at minimum the same functionality. The solution would be scalable and therefore cover a greater variety and number of taxpayers (from small taxpayers needing only one device to medium sized taxpayers needing many devices).
3. The Smartphone technology for replacing the S12 has not been applied but was under development. It would require 150 days to be developed, tested and be fully operational.

The features of the Smartphone technology are

- Solution is Scalable and User friendly
- Application to be used by Economic Operators.
- Suitable for semi automated economic operators.
- Scan the first and the last code and all the stamps are activated
- Option to Upload picture of the SKU
- The application is on the Smartphone
- This application requires a new generation of stamps to be implemented with printed 2D codes
- Smartphone devices will be accurate and convenient
- It will transmit encrypted data over a secured network
- In addition, SICPA offered a progressive upgrade of the existing SICPAMOBILE device within 18 months after signing of the addendum.
- SICPA committed to provide KRA with equipment and software allowing online check of tax status of tax payers. Such a solution is in development by

SICPA for Chile. CHESS Enterprises committed to provide 250 Smart Devices as soon as the software is available.

KRA further comments on SICPA'S 2<sup>nd</sup> proposal

1. KRA negotiated for the following additional items as a trade-off for reducing the numbers of SAS12 and SICPAMOBILES.
  - Advanced training offers
  - Equipment supply to cover transitional requirements until introduction of the new Smartphone applications.
  - Alternative technology on offer for production accounting
  - Verification and Authentication and Audit issues
  - Delivery and Installation of IP camera
  - Enhancement of Software database to accommodate the data and queries from system above.
2. KRA demanded that SICPA implement a stamps coding centre in Kenya with the extension to new product types.
3. KRA negotiated that the system should Integrate with other systems
  - Customs Systems
  - iTax System
4. Regarding the Technology applicable for the new model, KRA wanted an analysis of the Technology under the extended scope
5. Security feature – existing color shifting feature to be replaced , being used by counterfeiters
6. Proposal to have a USSD for checking the authenticity and flag if the code or stamp has been checked several times- Interactive reporting
7. KRA wanted a clarification on the number of SAS Equipments
8. KRA asked that marking of products other than tobacco for export be carried out free of charge, since the volumes are low .
9. KRA requested SICPA to decrease the implementation deadlines and to have simultaneous GO LIVE dates for all the products of the expanded scope.

SICPA'S further comments on the 2<sup>nd</sup> proposal

- New Stamp for each new product
- Use of Smartphone application for verification using barcode
- Levels of security:
  - i. Four levels of security
  - ii. Retailers – Use 2d barcode and colour shifting code

- iii. SICPA data code
- Products to be covered with new generation of stamps: all products included in the current scope, all product imported, all product manually manufactured as well as cosmetics.
- SICPA clarified that the new price model includes an unlimited number of SAS and SCL to be provided, implemented and operated by SICPA.
- SICPA position concerning export marking:
  - i. Such marking is included in Kenyan excise Law as well as in the FCTC Convention signed by Kenya as far as tobacco is concerned;
  - ii. The marking of tobacco packs for export require the implementation of direct coding technologies in addition to the current SAS already implemented and operational;
  - iii. It would be an inequality of treatment to oblige only tobacco exporters to pay for the EGMS solution.
- SICPA proposed different GO LIVE Date as follow:
  - i. Beer: July 1<sup>st</sup>, 2015
  - ii. Soft Drinks, November 1<sup>st</sup>, 2015
  - iii. Mineral Waters and Cosmetics early 2016.
- After consideration and internal evaluation, SICPA proposed the following implementation deadlines under the following assumptions:
  - i. Addendum signature before end February 2015
  - ii. New Contract Duration 5 years
  - iii. Beer, Soft Drinks and Cosmetics: Latest August 15, 2015 (if possible before)
  - iv. Mineral Water: Latest December 30, 2015 (if possible before)
  - v. Tobacco Export (if requested by KRA): Latest February 28, 2015 (if possible before)
  - vi. New Stamp Generation: July 1<sup>st</sup>, 2015
  - vii. Mobile Phone Activation: July 1<sup>st</sup>, 2015
  - viii. Line Motion Monitoring by 31.12.2015
  - ix. Other Technologies to be deployed progressively, latest 30 June 2016

## Proposed Implementation Timeline

	01-2	01-1	01-2	01-3	01-4	01-5	01-6	01-7	01-8	01-9	01-10	01-11	01-12	01-13	01-14	01-15	01-16	01-17	
Scoping / number of projects																			
Identify class, meet with class & staff																			
Recruit																			
Start classes																			
Assess																			
Review, revise																			
Final number of students / classes																			
Class starts																			
Student feedback																			
Final number of students																			
At the Technology Center / Project Area / Class / Student / International																			



The Summary of the negotiated final offer

On January 15<sup>th</sup> 2015, SICPA revised its offer to EUR 13.25 per 1'000 stamps excluding VAT being an Aggregated usage fee for:

1. The Stamp (on paper or digital code on the product),
2. the Service for Track & Trace computerized system, including a total up to 250 handheld terminals for KRA officers (90 additional to the 160 already delivered) and 10'000 VA11 cards for authentication by manufacturers, distributors, retailers and importers (already delivered) and,
3. The Integrated production accounting system fee, including a total of 33 revenue stamps activation equipments for importers (already delivered) but without limitation to the number of production line monitoring equipments)

In addition, SICPA made the following commitments:

4. Introduction of a 2D code to be printed on a new generation of stamps to enable activation and verification with Smart Devices (Smartphones and Tablets). New generation of stamps to be implemented upon full consumption of existing stamps stocked at both KRA (2 months stock estimate) and SICPA (3 months stock estimate).
5. Development and deployment of an application allowing activation with Smart Devices within 150 calendar days after signature of the Addendum for the expansion of the EGMS Platform.
6. Development and deployment of an application for Smart Devices to enable public verification of the stamp and the products.
7. Deployment of enhanced Line Monitoring System with the implementation of online cameras allowing detection of undeclared production.
8. Provide the equipment and software allowing online check of tax status of tax payers by KRA enforcement officers. The purpose of this application is to collect and display information from EGMS, iTax and Customs Management System. Provide 250 Smart Devices incorporating this software.
9. In addition to providing training and skills development on EGMS Platform (including ICT), SICPA offered to provide the following training:
  - i. Advanced Project Management,
  - ii. Field Enforcement strategies and tactics,
  - iii. Business Intelligence Report and Analysis,
  - iv. Combating illicit trade,
  - v. Laboratory Forensic,
  - vi. Any other subject jointly agreed.

Workshops and training will be organized quarterly for KRA managers and officers (workshop subjects to be jointly agreed), with a maximum of 600 trainee man-days per annum (excluding travel and hospitality costs).

10. In addition, one training per year will be organized by SICPA overseas for a total 5 KRA officers on topics to be jointly agreed by KRA and SICPA.

11. SICPA committed (upon SICPA readiness and within 18 months after signing of the Addendum -Contract) to progressively upgrade the current generation of handheld terminals for KRA officers towards a new generation of readers.

12. The new price model proposed is applicable as of GO LIVE Date of at least two new product categories included in the EGMS Platform (currently targeted for August 15, 2015 as per attached implementation plan).

13. The new Term proposed is 5 years as of GO LIVE of at least two new product categories included in the EGMS Platform.

14. SICPA committed to create, in addition to the expansion of the current operation, an Excellence Centre in Kenya including:

- i. A Coding Centre upon reaching an annual volume of 1 billion stamps to be delivered in reels to manufacturers and importers,
- ii. A Solution Development Centre,
- iii. A Customer Support and Training Centre for Kenya and the East African Region.

KRA				
No	Name	Designation	Signature	Date
1.	Mr. Caxton Masudi	Ag. Chief Manager		15/01/2015
2.	H. Omondi	Ag. Chief Manager		15/01/2015
3.	Mrs. Betty Kimeu	Assistant Manager - Finance		15/01/2015
4.	Karambu Muthaura	Officer DTD Itax		15/01/2015
5.	Jeremia Kinyua	Officer DTD LTO		15/01/2015
6.	Ms. Jane Chege	Manager- P&SS		15/01/15
7.	Kiprono Reuben	P&SS		15/01/15
On Behalf of SICPA				
8.	Christopher York	SICPA		15/01/2015

# ANNEX 6 – KRA LETTER TO PPRA





KENYA REVENUE  
AUTHORITY

(9) 01

REF: KRA/5/PSS13/2/10

21<sup>st</sup> July, 2015

Mr. J.O. Juma  
The Director General,  
Public Procurement Oversight Authority,  
National Bank Building,  
P.O. Box 58535-00200  
NAIROBI.

Dear Sir,

RE: DIRECT PROCUREMENT VALUED OVER FIVE HUNDRED THOUSAND SHILLINGS (500,000.00).

Attached hereto, please find the report on Direct Procurement Contracts valued above Kshs.500,000.00 for Tender Committee meeting held on 6<sup>th</sup> May, 2015.

Minutes for the meeting will be submitted as soon as the same are confirmed.

Submitted for your information.

Yours Faithfully,

GRACE MURICHU - KARIUKI (MRS.)  
Ag. DEPUTY COMMISSIONER  
PROCUREMENT & SUPPLIES SERVICES



**ANNEX 7 – KRA LETTER  
TO THE ATTORNEY  
GENERAL**







# KENYA REVENUE AUTHORITY

24<sup>th</sup> June 2015

KRA/5/BS12/8/C/78

Solicitor General  
State Law Office  
Sheria House  
NAIROBI

Dear Sir,

## CONTRACT FOR PRINTING, SUPPLY AND DELIVERY OF SECURITY REVENUE STAMPS COMPLETE WITH TRACK AND TRACE SYSTEM, AND INTEGRATED PRODUCTION ACCOUNTING SYSTEM FOR EXCISABLE GOODS

Please refer to the above and your telephone conversation with the Commissioner General.

The Contract for Printing, Supply and Delivery of Security Revenue Stamps complete with Track and Trace system, and Integrated Production Accounting System for a period of five (5) years was awarded to SICPA Security Solutions SA on 14<sup>th</sup> December, 2012 and the Contract signed on 18<sup>th</sup> April, 2013 for five (5) years. The contract award was as follows:

- Supply of Security Printed Stamps during the five (5) year period at a unit cost of Euro 0.00572 inclusive of VAT. The estimated no. of stamps was 3.55 billion over a period of five (5) years.
- Supply of Track and Trace System at a cost of Euro 10,450,000.00. for a period five (5) year period at the rate of Euro 2,090,000.00 per annum inclusive of VAT.
- Supply of Production and Accounting System at a total cost of Euro. 11,680,000.00. for a period for five (5) years inclusive of VAT.

The current contract is implemented on three (3) products (Tobacco, Wines and Spirits) with more than 850 million stamps delivered to date, with twenty eight (28) production lines equipped with automated production accounting and thirty three (33) automated production accounting lines.

The Government amended its Excisable regulations vide Legal Notice No. 110 of 18<sup>th</sup> June, 2013 (Excisable Goods Management System) Regulations that expanded the scope of the system to cover all excisable goods except Motor vehicles. These Regulations came into force after the contract had been signed on 18<sup>th</sup> April, 2013.

*Tulipe W. Mwangi*

Times Tower Building

Haile Selassie Avenue, P.O. Box 48240-00100 Tel: 310900 Fax: 316872



ISO 9001:2008 CERTIFIED

The current contract cannot be applied to cover the new products because of the following reasons:

- The current contract is for 3.55 billion stamps whereas the extended scope is estimated to require 12,876,633,889 stamps.
- It does not cover all excisable goods except Motor vehicles as provided for in the legal Notice. It only covers three (3) products (Tobacco, Wines and Spirits).
- Since the cost of the project is amortized over the contract period, using the current contract on the extended scope would amount to amortizing the cost within the remaining period estimated at three and half (3 1/2) years and this would result in higher unit costs and consequently funding constraints.
- The current cost limits the number of production line equipment. Any additional line generates an additional cost which is not sustainable.
- Any variation to the contract so as to include the extended scope is likely to be over the allowed 25% cumulative variation of a contract.

The use of Direct Procurement method was recommended pursuant to Section 74(2) (b) of the Public Procurement and Disposal Act, 2005 which provides that "A procuring entity may use direct procurement if it is satisfied there is no reasonable alternative or substitute for the goods, works or services".

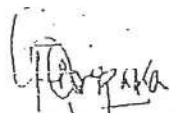
SICPA Security Solutions SA is the current supplier for Printing, Supply and Delivery of Security Revenue Stamps complete with Track and Trace system, and Integrated Production Accounting System and has been contracted to provide the services for a period of five (5) years and it has proprietary rights over the current system. The previous two tendering processes had yielded only one suitable bidder, SICPA Security Solutions.

We have gone through the procurement process and are ready to communicate the outcome to SICPA, but before then we would require you to review the proposed notification as well as draft contract.

Accordingly, we are hereby submitting the following for your kind review and comments:

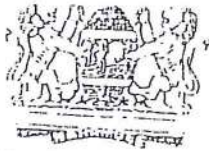
1. Draft notification of award,
2. Draft contract.

Yours Faithfully,

  
W. G. Ng'ang'a (Ms), OGW  
Deputy Commissioner  
Legal Services and Board Coordination

**ANNEX 8 – ATTORNEY  
GENERAL LETTER TO  
KRA**





REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL

&

DEPARTMENT OF JUSTICE

Our Ref: AG/CONF/2/6/61 VOL. VIII (34)  
Your Ref: KRA/5/BS12/8/C/78

1<sup>st</sup> July, 2015

Mr. John K. Njiraini, MBS  
Commissioner General  
Kenya Revenue Authority  
NAIROBI



Dear

*John Njiraini,*

RE: CONTRACT FOR PRINTING, SUPPLY AND DELIVERY OF SECURITY REVENUE STAMPS COMPLETE WITH TRACK AND TRACE SYSTEMS, AND INTEGRATED PRODUCTION ACCOUNTING SYSTEM FOR EXCISABLE GOODS

Reference is made to your letter Ref No. KRA/5/BS12/8/C/78 dated 24<sup>th</sup> June, 2015 on the above subject matter.

We have perused the Draft Notification Award, the Contract together with the documents that form part of the contract and wish to write as follows:

1. We advise that the minutes of the Negotiations meeting be signed and a copy be furnished to our office for records;
2. We wish to remind you that section 27 of the Public Procurement and Disposal Act stipulates that all public entities shall ensure that the Act, the regulations and any directions of the Authority are complied with respect to each of its procurements. We therefore advise that you ensure compliance with the Act in the identification and award of the Contract.
3. The Draft Contract and Notification of Award are in order from a legal point of view and may be executed once you address yourselves to the above issues.

Yours

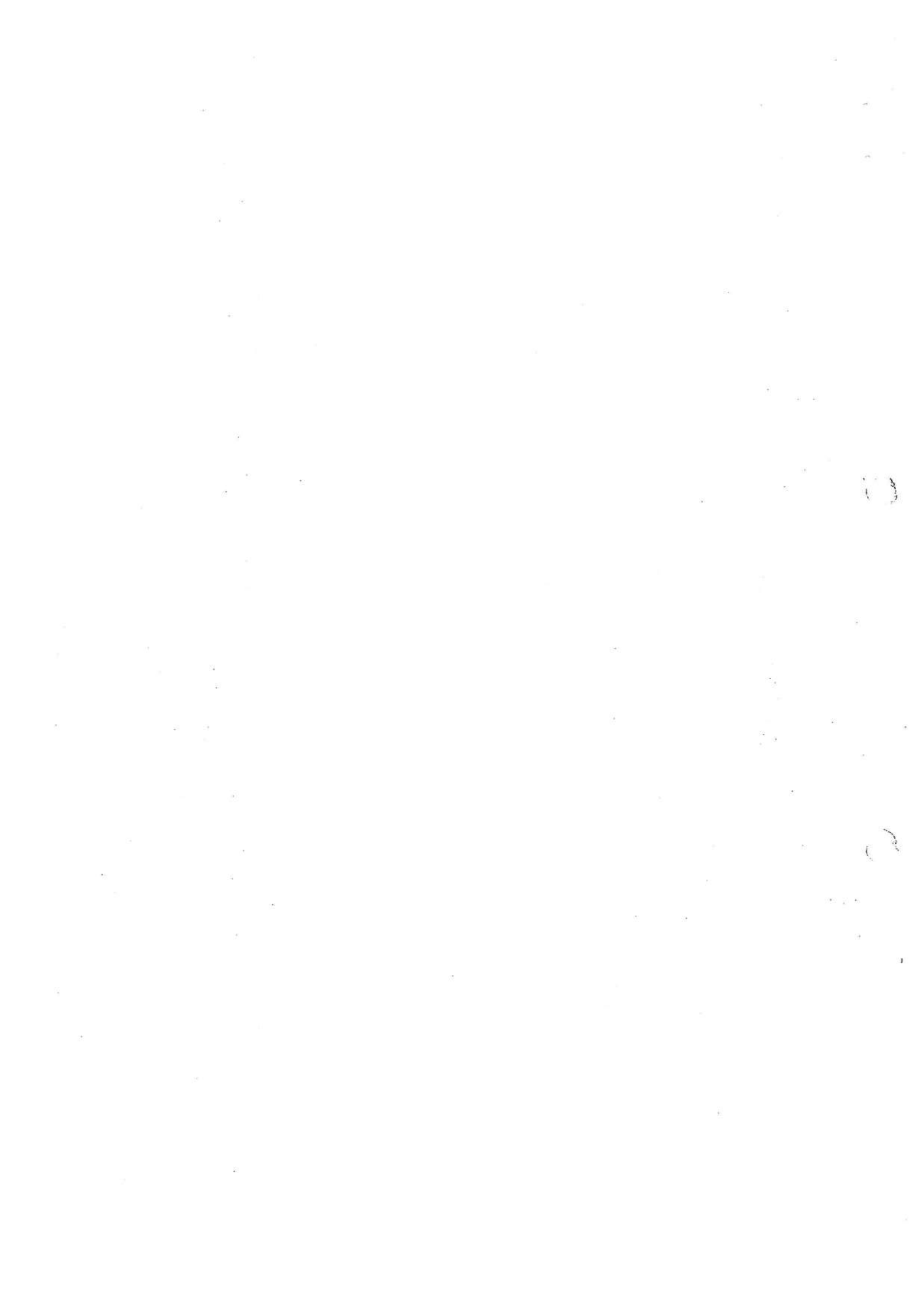
*Sincerely,*

*[Signature]*

NJEE MUTURI  
SOLICITOR GENERAL

CHERIA HOUSE, HARAMBEE AVENUE  
P.O. Box 40112, 00100, NAIROBI, KENYA TEL: +254 20 2227361/22251355/0711941552 FAX: +254 20 2227361  
E-MAIL: info.state@wotb.co.ke WEBSITE: www.attorney-general.go.ke

DEPARTMENT OF JUSTICE  
COMMERCIAL BANK HOUSE, HAMBELT AVENUE  
P.O. Box 40112, 00100, Nairobi, Kenya TEL: Nairobi 2224025/1  
E-MAIL: info@attorney-general.go.ke WEBSITE: www.attorney-general.go.ke



**ANNEX 9 – PIC LETTER  
TO MINISTRY OF  
FOREIGN AFFAIRS**





# REPUBLIC OF KENYA

Telegraphic Address  
'Bunge', Nairobi  
Tel. +254-020-221291  
Fax: +254-020-243694  
E-mail: [clerk@parliament.go.ke](mailto:clerk@parliament.go.ke)  
When replying please quote



Clerk's Chambers  
National Assembly  
Parliament Buildings  
P.O. Box 41842 -00100  
NAIROBI, Kenya

NATIONAL ASSEMBLY

Ref: NA/DCS/PIC/2018/149

7<sup>th</sup> September 2018

Amb. Macharia Kamau, CBS  
Principal Secretary,  
Ministry of Foreign Affairs & International Trade,  
NAIROBI.

Dear

**RE: APPEARANCE BEFORE PUBLIC INVESTMENTS COMMITTEE**

The Public Investments Committee is established pursuant to Standing Order No. 206, and is mandated to among others, examine the reports and accounts of public investments as submitted by the Auditor-General and also examine whether the affairs of public investments are being managed in accordance with sound financial or business principles and prudent commercial practices. Article 229 of the Constitution of Kenya also mandates Parliament to consider the Report of the Auditor General.

The Committee has been enquiring into the procurement process and implementation of the Kenya Revenue Authority Tender No. KRA/HQs/DP-423/2014-2015 for excisable Goods management System (EGMS) awarded to SICPA Security Solutions, SA on 17<sup>th</sup> July 2015 with a view to reporting the House as per its mandate. In the course of inquiry, the Committee heard that SCIPA Security Solutions had been investigated and blacklisted in some countries on the basis of bad business practices. Some of the countries that are alleged to have investigated and blacklisted the said company include Brazil, Morocco, Albania, Turkey, Philippines and USA.

The purpose of this letter is therefore, to request you to urgently provide the Committee with any relevant information on bad business practises of SCIPA Security Solutions SA.

Yours

A handwritten signature in black ink, appearing to be 'J. Ndombi'.

**JEREMIAH W. NDOMBI**  
**For: CLERK OF THE NATIONAL ASSEMBLY**

Copy to:-

Amb. Dr. Monica K. Juma, DPHIL, CBS  
Cabinet Secretary  
Ministry of Foreign Affairs & International Trade  
NAIROBI

**ANNEX 10 – NATIONAL  
ASSEMBLY LETTER TO  
KRA ON LEGAL NOTICE  
53 OF 2017**



# REPUBLIC OF KENYA

Telegraphic Address  
'Bunge', Nairobi  
Telephone 2848000  
Fax: 2243694  
E-mail: [clerk@parliament.go.ke](mailto:clerk@parliament.go.ke)  
When replying please quote



National Assembly  
Clerk's Chambers  
Parliament Buildings  
P. O. Box 41842 -00100  
NAIROBI, Kenya

KNA 2/4/2017/(248)

②

29<sup>th</sup> November, 2017

Mr. J. K. Njiraini MBS,  
Commissioner-General,  
Kenya Revenue Authority,  
P.O Box 48240-00100,  
**NAIROBI.**

Dear Mr. Njiraini,

**RE: REQUEST FOR INFORMATION ON LEGAL NOTICE NO. 53 DATED 30<sup>TH</sup> MARCH, 2017 AND PUBLISHED IN THE KENYA GAZETTE OF 4<sup>TH</sup> APRIL, 2017.**

We acknowledge receipt of your letter dated 24<sup>th</sup> November, 2017, Ref. No. KRA/LS & BC/DTD/1149 on the above subject matter.

This is to confirm that the Excise Duty (Excisable Goods Management Systems) Regulations, 2017 were forwarded by the Cabinet Secretary for National Treasury to the National Assembly for consideration by the Committee on Delegated Legislation. Subsequently, the regulations were tabled in the National Assembly and considered in the manner prescribed in the Statutory Instruments Act No. 23 of 2013.

Attached herewith, is a brief outlining the manner in which the regulations were considered by the National Assembly and the relevant supporting documents for your information.

Yours

A handwritten signature in black ink, appearing to read 'Sialai'.

A handwritten signature in black ink, appearing to read 'Sialai'.

**MICHAEL R. SIALAI, EBS**  
**CLERK OF THE NATIONAL ASSEMBLY.**





# KENYA REVENUE AUTHORITY

ISO 9001:2015 CERTIFIED

Office of the Commissioner General

Our Ref: KRA/LS & BC/DTD/1149

24<sup>th</sup> November, 2017

The Clerk  
National Assembly  
Parliament Buildings  
P.O. Box 41842 -00100  
**NAIROBI**

Dear Sir,

**RE: REQUEST FOR INFORMATION ON LEGAL NOTICE NO.53 DATED 30<sup>TH</sup> MARCH 2017 AND PUBLISHED IN THE KENYA GAZETTE OF 14<sup>TH</sup> APRIL 2017.**

①  
DOSP  
To provide  
the signature  
CMA  
Zhy D

The above subject matter refers.

The Authority has been sued in *Nairobi Constitutional Petition No.532 of 2017 Okiya Omtata versus KRA & 2 Others* on the basis that Legal Notice No.53 of 30<sup>th</sup> March 2017, was not laid before Parliament for approval as provided under the Statutory Instruments Act.

On the part of the Kenya Revenue Authority, the understanding and information that we have is that the Cabinet Secretary, National Treasury, forwarded the Draft Legal Notice to your Office and subsequently, the Legal Notice was presented to the relevant Committee of Parliament and later published for implementation.

We now seek your confirmation that the said Legal Notice, was subjected to the requisite process as outlined in the Statutory Instruments Act.

That confirmation and any necessary documentation is urgently required so that the Authority can prepare its defence in response to the Petition where limited time of fourteen (14) days was granted on 22<sup>nd</sup> November 2017, within which to file the defence.

We would appreciate if this information and any documents are availed to assist the parties and the Court in determining the dispute.

Yours faithfully,

J.K. Njiraini, MBS.  
**Commissioner - General**  
D/S/O

RECEIVED  
27 NOV 2017  
CLERK'S OFFICE

**COPY:** Permanent Secretary  
National Treasury  
**NAIROBI**



**Tulipe Ushuru Tujitegemee !**

Times Tower Building - 30th Floor Haile Selassie Avenue - P.O. Box. 48240, Nairobi, Kenya, Tel: 310900 - Fax: 316872







BRIEF ON THE EXCISE DUTY (EXCISABLE GOODS MANAGEMENT SYSTEMS) REGULATIONS, 2017

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1. On 30<sup>th</sup> March, 2017, as required under section 40(3) of the Public Finance Management Act, No. 18 of 2012 and Standing Order 241(2) of the National Assembly Standing Orders (2013), the Cabinet Secretary for National Treasury made a public pronouncement of the budget policy highlights and revenue raising measures for the national government for the financial year 2017/18. Thereupon, the Cabinet Secretary also submit *draft* Finance Bill, 2017 and related *draft* regulations including the *draft* Excise Duty (Excisable Goods Management Systems) Regulations, 2017 to the National Assembly.
2. Thereafter, following the publication of the final Excise Duty (Excisable Goods Management Systems) Regulations, 2017, Office of the Clerk of the National Assembly received the published version vide a letter copied to the Chairperson of the Delegated Legislation Committee dated 11<sup>th</sup> April, 2017 (*A copy of which is attached.*)
3. The National Assembly was however not in session having proceeded to a recess from 7<sup>th</sup> April, 2017 until 8<sup>th</sup> May, 2017 both days inclusive. The recess period was meant to accord Members opportunity to take part in the Party Primaries, most of which were scheduled to take part during that period (*See attached the calendar of the House.*)
4. Pursuant to section 11(1) of the Statutory Instruments Act No. 23 of 2013, the Cabinet Secretary for National Treasury is required to ensure that within seven sitting days after the publication of a statutory instrument, a copy of the statutory instrument is transmitted to the Responsible Clerk for tabling before Parliament.
5. Further, section 11(3) of the Statutory Instruments Act No. 23 of 2013 provides that the responsible Clerk shall register every statutory instrument transmitted to the House for tabling.
6. In light of the foregoing and the recess period, the regulations were tabled in the House on 10<sup>th</sup> May, 2017 a date which is within the prescribed seven sitting days (*A copy of the regulations indicating the date they were tabled is attached herein.*)
7. Following the tabling, the said regulations stood referred to the Committee on Delegated Legislation for consideration pursuant to Standing Order 210 of the National Assembly Standing Orders (*A copy of the Hansard report and the Votes and Proceedings for the particular day are attached herein*) and section 12 of the Statutory Instruments Act No. 23 of 2013, which provides that every statutory instrument issued, made or established after the commencement of the Act shall upon tabling before the respective House of Parliament stand referred to



(A)

- the Committee established for the purpose of reviewing and scrutinizing statutory instruments.
8. It is worth noting that, pursuant to section 15(1) of the Statutory Instruments Act No. 23 of 2013, the Committee is required to make a report to the House containing only a resolution that the statutory instruments referred to the Committee be revoked. Indeed, unless a specific provision exists in law requiring an express approval of the House on specified regulations (such as those under the Elections Act, 2011, Parliament **DOES NOT** engage in approving or amending all or part of statutory instrument. Only an annulling resolution is contemplated where the relevant Committee moves the House to resolve as such, within the specified period.
  9. Section 15(2) of the Statutory Instruments Act No. 23 of 2013 further provides that *“where the Committee does not make the report referred to in subsection (1) within twenty-eight days after the date of referral of the statutory instrument to the Committee under section 12, or such other period as the House may, by resolution approve, the statutory instrument shall be deemed to have fully met the relevant considerations referred to in section 13.*
  10. This means that if the Committee does not make a report within the aforementioned period, it is deemed that Parliament has no objection to any provision of the regulations and therefore the particular regulations come into force having met the considerations specified in the Act.
  11. The Committee on Delegated Legislative issued a notice of meeting to its Members to consider the regulations on 8<sup>th</sup> June, 2017. (A copy of the notice of meeting of the Committee is attached herein). It is on record that, the Committee on Delegated Legislation attempted to hold meetings severally, but could not attain the requisite quorum to meet. This was attributable to the fact that with less than three months left to the 8<sup>th</sup> August, most Members were focused on the elections. The Committee did not therefore meet to deliberate on the regulations and make a report to the House within twenty-eight days after the date of referral of the regulations to the Committee as required by law.
  12. In view of the foregoing, we observe that the Excise Duty (Excisable Goods Management Systems) Regulations, 2017 came into force on 7<sup>th</sup> June, 2017, which is twenty-eight (28) days after 10<sup>th</sup> May, 2017 in accordance with the provisions of sections 11, 12 and 15(2) of the of the Statutory Instruments Act No. 23 of 2013.

M. R. SIALAI, EBS  
Clerk of the National Assembly  
November 29, 2017



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Parliament Buildings,  
NAIROBI  
8th June 2017

COMMITTEE ON DELEGATED LEGISLATION

The Clerk of the National Assembly presents his compliments to Members of the Delegated Committee and has the honor to inform them that a meeting of the Committee will be held on Thursday 8th June, 2017, in Committee room 5 , Main Parliament Buildings at 10:00 am

AGENDA

1. Preliminaries
2. Meeting with the Cabinet Secretary for National Treasury on VAT and Excisable Goods Management Systems Regulations, 2017
3. Any Other Business.

Copies to

- |                                       |   |                  |
|---------------------------------------|---|------------------|
| Hon. William Cheptumo, M.P.           | - | Chairperson      |
| Hon. Joseph Gitari, M.P.              | - | Vice Chairperson |
| Hon. George Theuri, M.P.              |   |                  |
| Hon. Elisha Busienei, M.P.            |   |                  |
| Hon. Hassan Adan Osman, M.P.          |   |                  |
| Hon. Mohamed Aden Huka, M.P.          |   |                  |
| Hon. William Kisang', M.P.            |   |                  |
| Hon. Benard Shanali, M.P.             |   |                  |
| Hon. Charles Gimose, M.P.             |   |                  |
| Hon. Vincent Musau, M.P.              |   |                  |
| Hon. Tom. J. Kajwang, M.P.            |   |                  |
| Hon. Nicholas Nixon, M.P.             |   |                  |
| Hon. Saney Abdi Ibrahim, M.P.         |   |                  |
| Hon. Daniel Maanzo,MP                 |   |                  |
| Hon. Timothy Wanyonyi Wetangula, M.P. |   |                  |
| Hon. Yusuf Hassan, M.P.               |   |                  |
| Hon. Neto Agostinho, M.P.             |   |                  |
| Hon. Kabando wa Kabando, M.P          |   |                  |
| Hon. Simba Arati, M.P.                |   |                  |
| Hon. Paul Bii, M.P.                   |   |                  |
| Hon. Michael Kisoi Manthi, M.P.       |   |                  |
| Hon. Eusilah Jepkosgei, M.P.          |   |                  |
| Hon. Paul Koinange, M.P.              |   |                  |
| Hon. John Waiganjo, M.P.              |   |                  |
| Hon. Alfred Keter,MP                  |   |                  |
| Hon. Hon. Kamoti Mwamkale,MP.         |   |                  |
| Hon. Shadrack Manga, MP               |   |                  |
| Hon. Rachael Ameso,MP                 |   |                  |
| Hon. Junet Sheikh, MP                 |   |                  |



**ANNEX 11 – LEGAL  
NOTICE 110 OF 2013**





18th June, 2013

LEGAL NOTICE NO. 110

THE CUSTOMS AND EXCISE ACT  
(Cap. 472)

IN EXERCISE of the powers conferred by section 234 of the Customs and Excise Act, the Cabinet Secretary to the National Treasury makes the following Regulations:—

THE CUSTOMS AND EXCISE (EXCISABLE GOODS MANAGEMENT SYSTEM)  
REGULATIONS, 2013

Citation.

1 These Regulations may be cited as the Customs and Excise (Excisable goods Management System) Regulations, 2013.

Interpretation

2. In these Regulations, unless the context otherwise requires—

“authorised officer” means an officer authorised by the Commissioner to perform any act under these Regulations;

“compounded spirit” means spirit ready for consumption as a beverage and put up for retail;

“contractor” means a person appointed by the Commissioner to supply, install, and maintain the System;

“Excisable goods management system” in these Regulations referred to as “the System” includes excise stamps, track and trace system, production accounting system and related software and hardware;

“importer” means a person registered as an importer by the Commissioner to import excisable goods specified under these Regulations;

“Manufacturer” means a manufacturer licensed to manufacture goods specified in these Regulations;

“package” means packet, bottle or similar retail unit of excisable goods specified in these Regulations;

“printer” means a person appointed by the Commissioner to print and supply excise stamps; and

Excisable goods to be affixed with excise stamps.

3. Every package of excisable goods, except motor vehicle, manufactured in or imported into Kenya shall be affixed with an excise stamp of a type and in a manner specified by the

11, 1900 A

Commissioner.

Features of the excise stamp.

4. Every excise stamp required to be affixed under regulation 3 shall be of such specifications as-

- (a) to deter counterfeiting;
- (b) to facilitate tracking of the stamps and excisable goods along the supply chain;
- (c) to enable accounting for the production of excisable goods manufactured or imported; and
- (d) to facilitate any persons in the supply chain to authenticate the stamps and excisable goods.

Excise stamps fee.

5. (1) Manufacturers and Importers shall purchase excise stamps from the Commissioner at a prescribed fee.

(2) The fee prescribed by the Commissioner under paragraph (1), shall not exceed the cost of the stamps and the maintenance costs of the System.

(3) The revenue from the sale of excise stamps shall be retained by the Commissioner for financing the System.

Registration.

6. (1) The Commissioner shall register importers of any excisable goods specified under these Regulations subject to such conditions as he may deem necessary.

(2) A person shall not manufacture or import excisable goods for which an excise stamp is required to be affixed in accordance with these Regulations, unless that person is licenced or registered by the Commissioner.

Application for excise stamps

7. (1) A manufacturer or importer shall apply to the Commissioner for excise stamps in the prescribed format.

(2) An application made under subparagraph (1) shall be submitted to the Commissioner at least ninety days prior to the manufacture or importation of the goods.

(3) A manufacturer or importer shall pay for excise stamps upon approval by the Commissioner.

(4) In case of imports, the Commissioner may require evidence of importation before delivery of excise stamps.

(5) Despite subparagraph (4), the Commissioner may, subject to such conditions as he may specify, allow delivery of excise stamps to a person before importation.



Forecast of Consumption.

8. (1) The Commissioner may require a manufacturer or importer to provide, at least 120 days before the beginning of every financial year, a forecast of quantities of excise stamps which the manufacturers and importer intend to use in the subsequent year.

(2) A manufacturer or importer shall bear the cost of the excise stamps procured under the forecast and not used.

Appointments.

9. (1) Subject to the law regulating public procurement, the Commissioner shall appoint a suitable person to –

- (a) print and deliver excise stamps;
- (b) develop and install the System; and
- (c) install any other related systems.

(2) A person appointed under paragraph (1) shall not print any excise stamps required under these Regulations unless requested by Commissioner.

Delivery of excise stamps.

10. (1) The Commissioner may, where necessary and subject to such conditions as he may impose, require the printer to deliver excise stamps directly to a manufacturer, or importer.

(2) The printer shall notify the Commissioner of the quantity and type of the excise stamps supplied under paragraph (1) within such period as the Commissioner may require.

Place and time of affixing excise stamps.

11. (1) Excise stamps shall be affixed on excisable goods –

- (a) in case of locally manufactured goods, in the production facility immediately after packaging;
- (b) in the case of imported goods, in a place approved by the Commissioner within seven days upon clearance from Customs for home use;
- (c) in any other case, at a place appointed by the Commissioner.

12. Despite paragraph (1) (b), the Commissioner may allow excise stamps on imported excisable goods to be affixed in the production facility in the exporting country subject to such conditions as the Commissioner may specify.

Return or transfer of excise stamps.

13. (1) Manufacturers or importers shall return unused excise stamps to the Commissioner when—



- (a) they stop manufacturing;
  - (b) there are defects in the excise stamp sheets or reels;
  - (c) they fail to import;
  - (d) the excise stamps are declared out of use by the Commissioner;
  - (e) the Cabinet Secretary for finance exclude the products from the requirements of these Regulations;
- (2) Except for the stamps returned under paragraph 1(a) and (b), the Commissioner shall refund, within sixty days, the fees paid on the returned excise stamps.

Allowance for wastage and damages.

14. (1) Damaged excise stamps shall be preserved for verification by an authorised officer.

(2) Where a manufacturer or importer cannot account for the excise stamps issued to him by the Commissioner, the Commissioner shall compute excise duty and other taxes on the unaccounted excise stamps based on the highest excise rate of excise duty, value and volume of excisable goods manufactured or imported by the person.

(3) In computing excise duty on account of the unaccounted excise stamps, the Commissioner shall allow a wastage and damages not exceeding one percent of the issued stamps.

Transfer of excise stamps.

15. (1) A manufacturer or importer may, with prior approval of the Commissioner, transfer excise stamps in stock to another manufacturing unit owned by the same manufacturer or importer.

(2) The Commissioner shall prescribe the procedure and condition for transfer and accounting of excise stamps under this paragraph.

(3) A manufacturer or importer who transfers excise stamps without prior approval of the commissioner commits an offence.

Installation of the System.

16. A manufacturer or importer of excisable goods specified in these Regulations shall facilitate the installation of the System in their production or import facilities in accordance with the provisions of these Regulations.

Composition the System.

17. The System installed under regulation 16 shall be composed of —

- (a) excise stamps authentication and validation equipment;





- (b) devices for identification and association of each package with individual excise stamp;
- (c) production accounting equipment; and
- (d) devices for the control, registration, recording and transmission of data on the quantities of excisable goods to the Commissioner.

Marking of product packages.

18. (1) The Commissioner may require that the excisable goods be marked by the System on each package and in a visible place, as appropriate for the type of package, by a process of printing with indelible security ink, with codes that enable authentication, production accounting and track and trace of excisable goods.

Integration.

19. The installation, integration, preventive and corrective maintenance procedures of all the equipment comprising the System at the manufacturers or importers' premises shall be done by an authorised contractor under the supervision of an authorised officer.

Development and supervision.

20. The Commissioner shall be responsible for –

- (a) defining the functional, security and fiscal control requirements to be observed by the contractor in developing the System;
- (b) supervising and monitoring the process of installing the System.

Installation of equipment and devices.

21. (1) The System shall be installed on all production lines at the manufacturers or importers premises corresponding to each packaging machine and labelling machine;

(2) The System for management of imports shall be installed in a manner prescribed by the Commissioner.

Notice of installation.

22. (1) The manufacturers and importers shall be notified in writing by Commissioner at least thirty days in advance regarding –

- (a) requirements for the equipment to facilitate use of System;
- (b) the adaptive features required, on each production line;
- (c) the connectivity features and operating environment for the installation and operation of computers and other equipment comprising the system;
- (d) the starting date of installation of the System.



Advance reports on new brands etc.

29. Manufacturer or importer shall—

- (a) declare to Commissioner packages and labels of brands manufactured or imported including those for export and duty free;
- (b) declare to the Commissioner, at least thirty days in advance the start of production of new brands of goods or any change in the graphic art of existing ones, together with the corresponding packages and labels;
- (c) apply at least thirty days to the Commissioner for installation or removal of the System, as the case may be, in the occurrence of the following events—
  - (i) reactivation of inoperative production lines;
  - (ii) deactivation of production lines;
  - (iii) maintenance and reallocation of production lines;
  - (iv) installation of new production lines; and
  - (v) acquisition or sale of industrial machinery and equipment.

Marking of duty free products and packages.

30. (1) All packages of duty free or export excisable goods specified in these Regulations shall bear distinct markings to enable track and trace.

- (2) The material wrapping the package for wholesale purposes shall be printed—
  - (a) in the case of exports, the country of final destination; or
  - (b) in case of excisable goods for consumption in Kenya, "FOR USE IN KENYA";
  - (c) in case of excisable goods for sale to Duty-free shops, or Diplomatic shops, "DUTY FREE"; and
  - (d) in the case of excisable goods for consumption by Kenya Defence Forces, "KENYA DEFENCE FORCES".

Exemption from excise stamps.

31. (1) Excisable goods—

- (a) manufactured for export, Kenya Defence Forces or delivered to a duty free shop;
- (b) imported or purchased from a duty free shop by privileged persons and institution listed in



the Third Schedule to the Act;

(c) with approval of the Commissioner of Customs, imported into Kenya as samples or by international mail, with no commercial value, shall be exempted from the requirement of excise stamps.

Verification of stamps.

32. A manufacturer, importer, distributor, retailer or any other person involved in the supply chain of excisable goods, shall verify and authenticate the stamps and excisable goods before admitting them in their premises or in any way handle the goods.

Prohibition and offences.

33. (1) A person shall not—

(a) import any excisable goods on which an excise stamp should be affixed without being registered with the Commissioner in accordance with these Regulations;

(b) fail to maintain excise stamp register or records as the Commissioner may prescribe;

(c) fail to affix an excise stamp on the package of excisable goods in such secure manner as the Commissioner may prescribe;

(d) print over or deface an excise stamp affixed on a package;

(e) knowingly submits a return that is incorrect;

(f) fail to furnish any information that the Commissioner may require;

(g) be in possession of excisable goods on which the excise stamps have not been affixed and which are not exempted under these Regulations;

(h) attempt to acquire or acquire an excise stamp without authority from the Commissioner;

(i) counterfeit, or print, make or in any way create an excise stamp without the authority of the Commissioner;

(j) be found in possession of an excise stamp printed, made or in any way acquired without the authority of the Commissioner;

(k) be found in possession of, convey, distribute, sell, offer for sale or by way of trade expose excisable goods without affixing excise stamps in accordance with these Regulations.

(2) A person who contravenes the provisions of paragraph (1) commits an offence and is liable upon conviction to a fine not less than one hundred thousand shillings and not more than one million five hundred thousand shillings or to imprisonment for a term not exceeding three years or, to both.



General penalty.

34. A person who commits an offence under these Regulations for which no specific penalty is provided is liable, on conviction, to a fine not less than one hundred thousand shillings and not more than one million five hundred thousand shillings or to imprisonment for a term not exceeding three years or, to both.

Seizure of stamps, equipment and goods.

35. The Commissioner shall seize excise stamps, equipment and goods where—

(a) excise stamps are—

(i) counterfeited;

(ii) subject to return and manufacture or importer fails to do so; or

(iii) found in the possession of persons other than to whom they have been supplied.

(b) the equipment or plant is used in the manufacture of counterfeit excise stamps;

(c) the goods—

(i) bear counterfeited excise stamps;

(ii) bear excise stamps affixed in a manner not consistent with guidelines prescribed by the Commissioner;

(iii) do not bear excise stamps as required in accordance with these Regulations.

Disposal of forfeited excise stamps and seized goods.

36. Any excisable goods, stamps and equipment which are seized under these Regulations shall be disposed in a manner that the Commissioner considers fit.

Revocation of LN. 84 of 2008.

37. The Customs and Excise (Excise Duty Stamps) Regulations, 2008 are revoked.

Made on the 18th June, 2013.

HENRY ROTICH,  
Cabinet Secretary for the National Treasury.







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09 September, 2013

GAZETTE NOTICE NO. 12856

THE CUSTOMS AND EXCISE ACT

(Cap. 472)

PRICE OF AN EXCISE STAMP

PURSUANT to regulation 5 of the Customs and Excise (Excisable Goods Management System) Regulations of 18th June, 2013, the Commissioner-General prescribes the price of an excise stamp to be one shilling and fifty cents (KSh. 1.50) with effect from 9th September, 2013.

Dated the 5th September, 2013.

J. K. NJIRAINI,

*Commissioner-General, Kenya Revenue Authority.*

PRINTED AND PUBLISHED BY THE GOVERNMENT PRINTER, NAIROBI

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