

EMPIRICAL JURIDICAL REVIEW OF THE IMPLEMENTATION OF EPC CONTRACTS AT THE JBHSR PROJECT

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Abstract

The Jakarta Bandung High Speed Railway Project (JBHSR) is a National Strategic project in accordance with Presidential Regulation No. 107 of 2015 dated October 6, 2015, concerning the Acceleration of High-Speed Railway Infrastructure and Facilities between Jakarta and Bandung. The JBHSR project has a track of 142.3 Km from Halim Station to Tegalluar Station which will be reached within 45 minutes. The JBHSR project is a project that uses the EPC/Turnkey Project (Silver Book) contract model. During the implementation of the Jakarta Bandung High Speed Railway Project, the Contractor submitted many claims to the Owner, both claims that have been stipulated in the contract and claims that have not been regulated in the contract. This occurs due to delays, change orders, many changes in the drawing, field conditions that are different from the drawing, requests from third parties to the Owner accommodated by the Owner, changes in Government regulations and others. Some of the notes contained in the Preface to the First Edition of the Silver Book of EPC/Turnkey Project Contracts (Silver Book) related to the provisions of when the contract for this EPC/Turnkey Project is not suitable for use are less noticed. This JBHSR project is large and very complex, it is better to have formed a DAB (DAB Standing) from the beginning, because the continuous involvement of DAB standing can help identify and resolve problems before they develop into larger disputes.

Keywords: *EPC, JBHSR, Silver Book*

Abstrak

Proyek Kereta Cepat Jakarta Bandung (JBHSR) adalah proyek Strategis Nasional sesuai dengan Peraturan Presiden No. 107 Tahun 2015 tanggal 6 Oktober 2015 tentang Percepatan Infrastruktur dan Fasilitas Kereta Cepat antara Jakarta dan Bandung. Proyek JBHSR memiliki jalur sepanjang 142,3 Km dari Stasiun Halim hingga Stasiun Tegalluar yang akan ditempuh dalam waktu 45 menit. Proyek JBHSR adalah proyek yang menggunakan model kontrak EPC/Turnkey Project (Silver Book). Selama pelaksanaan Proyek Kereta Cepat Jakarta Bandung, Kontraktor mengajukan banyak klaim kepada Pemilik, baik klaim yang telah diatur dalam kontrak maupun klaim yang belum diatur dalam kontrak. Hal ini terjadi karena keterlambatan, perubahan pesanan, banyak perubahan pada gambar, kondisi lapangan yang berbeda dari gambar, permintaan dari pihak ketiga kepada Pemilik yang diakomodasi oleh Pemilik, perubahan peraturan Pemerintah dan lainnya. Beberapa catatan yang tercantum dalam Kata Pengantar Edisi Pertama Buku Perak Kontrak Proyek EPC/Turnkey terkait ketentuan kapan kontrak untuk Proyek EPC/Turnkey ini tidak cocok untuk digunakan kurang diperhatikan. Proyek JBHSR ini besar dan sangat kompleks, akan lebih baik jika telah membentuk DAB (DAB Standing) sejak awal, karena keterlibatan DAB secara terus-menerus dapat membantu mengidentifikasi dan menyelesaikan masalah sebelum berkembang menjadi perselisihan yang lebih besar.

Kata kunci: *EPC, JBHSR, Silver Book*

INTRODUCTION

The Jakarta Bandung High Speed Railway Project (JBHSR) is a National Strategic project in accordance with Presidential Regulation No. 107 of 2015 dated October 6, 2015, concerning the Acceleration of High-Speed Railway Infrastructure and Facilities between Jakarta and Bandung. The JBHSR project aims to improve transportation services to support development in the Jakarta to Bandung area. The JBHSR project has a track of 142.3 Km from Halim Station to Tegalluar Station which will be reached within 45 minutes.

The construction work of the JBHSR project is carried out by the High-Speed Railway Contractor Consortium (HSRCC), which is WIKA's collaboration with six contractors from China, namely CRIC, CREC, SINOHYDRO, CRSC, CRRC, and CRDC (which previously used the name TSDI).

KCIC and HSRCC have carried out negotiations regarding the signing of the Construction Contract stated in the MOM on March 31, 2017, and April 1, 2017. In the MOM, it was agreed that the contract value refers to the revised Feasibility Study document of the January 2017 version and it was agreed that the signing of the contract will be carried out on April 4, 2017. Then, before the signing of the contract on April 4, 2017, WIKA submitted a letter dated April 3, 2017, which basically WIKA agreed to sign the Contract, on the condition that the Parties after signing must negotiate further related to the price of the Contract, especially in the work part of WIKA. Furthermore, in the discussion of the Minutes of Meeting (MOM) dated January 26, 2018, and MOM dated April 26, 2018, KCIC and HSRCC also agreed to discuss further regarding the adjustment of the contract price to be later outlined in an Addendum.

The JBHSR project is a project that uses the EPC/Turnkey Project (Silver Book) contract model. Projects that use the EPC contract model have very high challenges, ranging from interdependence between existing activities, overlapping phases between each of these activities, breaking down activities into more detailed work activities, complexity of organizational structure, and uncertainty in prediction accuracy that arises during the implementation period. The most challenging activities in this project are activities in making budgets and project implementation schedules because they must be made and known before the project starts.

The implementation of projects using the EPC contract model is still not running as it should and there are still frequent claims and disputes between Service Users and Service Providers whose settlement takes considerable time, cost and energy from both parties and until it comes down to arbitration and/or court [Hardjomuljadi, 2020]. These claims and disputes still arise in the JBHSR project; in fact, some of them may need to be settled by arbitration or Dispute Adjudication Boards (DAB). Upon closer examination, it becomes clear why there are still a lot of claims and disagreements: the parties to the project still have differing opinions, and the Introductory Note to the First Edition of the EPC/Turnkey Project Contract Book (Silver Book) contains a number of notes about the Conditions of Contract for EPC/Turnkey Project that are not appropriate for use and are ignored. FIDIC (1999).

The notes contained in the Introductory Note to First Edition of the EPC/Turnkey Project Contract Book (Silver Book) related to the Conditions of Contract for EPC/Turnkey Project are not suitable for use under the following circumstances:

1. If there is insufficient time or information for tenderers to scrutinize and check the Employer's Requirements or for them to carry out the design, risk assessment and estimating (taking particular account Sub-Clauses 4.12 and 5.1).
2. If construction will involve substantial work underground or work in other areas which tenderers cannot inspect.
3. If the Employer intends to supervise closely or control the Contractor's work, or to review most of the construction drawings.
4. If the amount of each interim payment is to be determined by an official or other intermediary.

This study will attempt to investigate the four points mentioned in the Introductory Note to the First Edition of the EPC/Turnkey Project Contract Book. These points are actually apparent and attainable right away, but they are less concerned and insist on using this EPC contract model.

RESEARCH METHODS

This type of research is juridical, empirical, or it can also be called field research that examines the compatibility between theory and practice that runs in society or in other words, this research examines and analyzes the work of law in society [Bachtiar,

2018]. To find the necessary facts and data gathered, then identify the problem and solve it.

The phrase "empirical juridical" describes a legal research methodology that blends empirical (based on observation or experience) and juridical (legal) elements. To comprehend how law functions in practice, this interdisciplinary research approach combines legal (juridical) analysis with the gathering and examination of empirical data.

The empirical juridical approach's primary objective is to comprehend the law more thoroughly and deeply. It considers both how the law functions in real-world situations and its theoretical underpinnings.

Legal practice, legislative reform, and public policymaking all benefit greatly from empirical legal research. Legal professionals and policymakers can make more responsible and enlightening choices by integrating empirical data with legal analysis. The empirical juridical approach, which considers both the theoretical and practical aspects of the law, provides a more thorough method of comprehending and applying the law overall.

RESULT AND DISCUSSION

1. Discussion of the four points mentioned in the Introductory Note to First Edition of the EPC/Turnkey Project Contract Book (Silver Book) related to the Conditions of Contract for EPC/Turnkey Project are not suitable for use

- a. If there is insufficient time or information for tenderers to scrutinize and check the Employer's Requirements or for them to carry out the design, risk assessment and estimating.



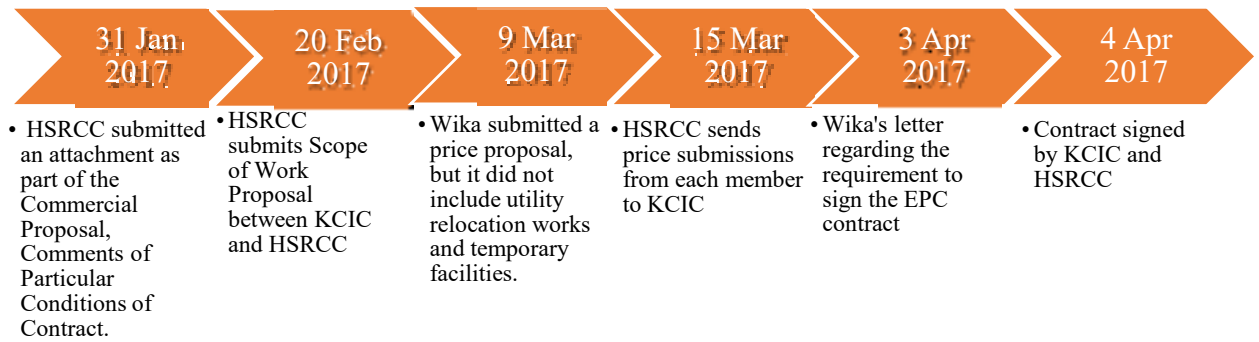


Figure 1. Chronology of JBHSR Project Procurement

The JBHSR project's procurement timeline shows that the process took only two months, beginning on January 16, 2017, when KCIC invited the HSRCC consortium that had met the prequalification requirements to take part in the High-Speed Railway Project's procurement, and ending on March 15, 2017, when HSRCC sent KCIC a price proposal from each HSRCC member. Given the project's enormous value of 4,701 M USD, or 62.8 T Rupiah, and its location, which is 142.3 km long, the 2-month tender period is woefully insufficient. This is undoubtedly very difficult and impossible, especially for local contractors like PT Wijaya Karya (Persero) Tbk who lack experience working on high-speed railway projects with Chinese standards.

WIKa sent a letter to KCIC and other HSRCC members on April 3, 2017, outlining the requirements for WIKa to sign a contract with specific terms that must be fulfilled. One of these requirements is the need for additional work-related price negotiations, as Wika is aware that the contract price for a few major projects that it will undertake is significantly lower than the local price.

On January 26, 2018, KCIC and HSRCC met to discuss a solution to the long-standing EPC pricing issue that prevented contractor members from beginning field work right away. The KCIC Board of Commissioners and Board of Directors, along with representatives from the HSRCC, attended the meeting. Among other things, they decided to change the contract regarding what the definition of Price Adjustment for Work should include:

- 1) Change of price, which is a change in price based on the actual price that is made in the field; and

- 2) Change in Cost, which is a change in price based on a formula for adjustments based on costs affected by inflation.
- 3) In addition, it was also agreed that the amendment of the Contract related to this Price Adjustment should be processed and decided within 6 months.

The Board of Commissioners and the Board of Directors of KCIC met with representatives of HSRCC members on April 26, 2018, and one of the agreements reached was that KCIC and HSRCC would use the BOQ in the contract amendment to make price adjustments while referring to the actual construction conditions. KCIC will oversee fixing any mistakes in the design specifications and the estimated cost, as well as modifying the contract price.

KCIC instructed contractors to begin field work on June 9, 2018, by issuing a Notice to Proceed (NTP). The work started in the field more than a year after the contract was signed. This occurred because the contractor believed there was insufficient time to perform a land survey, gather comprehensive and detailed information, design the project, and determine the cost of completion. As a result, more time was needed to consult to reach an agreement between the owner and the contractor on the contract price before the work began in the field.

Even after the project was finished and the high-speed railway was put into service, there are still issues that eventually turn into disagreements. For example, price adjustments that were initially agreed upon in principle at the meetings on January 26 and April 26 of 2018 became contentious again when KCIC's directors changed, and it was ultimately decided that the DAB or arbitration process would be used to settle the matter.

The cost change (escalation) that has been implemented and paid for only domestic (onshore) elements is still a contentious issue that will be resolved through arbitration or DAB for offshore elements. Because it will take longer to complete the work, delaying its implementation will undoubtedly increase the overall value of the cost change or escalation. In reference to this escalation, the contract has always contained it.

It's also noteworthy that no land acquisition had been made at the time the contract for the Jakarta Bandung High Speed Railway Project was signed. As a result, the contractor was unable to conduct a land investigation or more thorough

and in-depth research to obtain more comprehensive information about the project. The land will be turned over gradually and by no later than December 31, 2018, according to the contract's attachment to the land handover schedule. With a cumulative progress of 5.25 percent, Site Hand Over Certificate-I was held on June 14, 2017, and Site Hand Over Certificate-II was held on November 14, 2017. The land handover will be delayed until March 2021, which will undoubtedly have an impact on the project's completion. The high-speed railway track may occasionally be moved during a difficult land acquisition; naturally, this will result in a change in design and additional work (VO).

The extension of time has been discussed and agreed upon multiple times, but even though the Contractor has provided the data and supporting documentation, there has not yet been a consensus on the value of the overhead claim for the extension of time that was accepted by both parties. In the end, this will also turn into a disagreement that will be resolved through arbitration or DAB.

Before signing an EPC contract, it is crucial to have a clear and comprehensive definition of the project scope because scope changes can result in significant additional costs.

- b. If construction will involve substantial work underground or work in other areas which tenderers cannot inspect.

The main work of the Jakarta Bandung high-speed railway project is as follows:



Figure 2. The main work of the Jakarta Bandung high-speed railway project

Tunnel and bridge foundation construction, as well as some sub-grade excavation work, are clearly underground works. Since there was no land released at the time the construction contract was signed, the contractor has not been able to perform a soil investigation or thoroughly and thoroughly inspect the field conditions. The design's suitability for the field's actual soil conditions is

undoubtedly significantly impacted by this. Given the limited data available and the impossibility of conducting a land survey on-site, the contractor's design and price quote are unquestionably inaccurate when they are requested to create a design and provide a price quote in compliance with the employer's requirements. This poses a significant risk to the contractor because, under an EPC contract, the contractor bears the greatest responsibility and burden. Various assumptions and real-world conditions in the field can lead to design modifications that impact the cost of completing the work. Determine the issue and find a solution after gathering the required information.

- c. If the Employer intends to supervise closely or control the Contractor's work, or to review most of the construction drawings.

EPC agreements frequently lock in designs at the start of a project. If the project calls for major design modifications while it is being carried out, the EPC model might be too strict. Because it gives the contractor complete control, an EPC contract might not be a good fit if the project owner wants to be actively involved in all decision-making processes, including design and construction. KCIC controls and closely monitors the contractor's work even though it has granted HSRCC the Employer's Requirement (ER). While the work was being done, many of the ER's designs were altered, including the station design, the slope protection design, the single pier design into the portal, and others. KCIC continues to have control over the CRDC design consultant, who is already a contractor for HSCC, even though construction has begun.

- d. If the amount of each interim payment is to be determined by an official or other intermediary

The JBHSR Project's measurement, settlement, and payment flow chart.



Figure 3. The JBHSR Project's measurement, settlement, and payment flow chart

According to this flow chart, the China Development Bank (CDB), the project's lender, must give its approval before the contractor can make any bill payments. As a contractor, HSRCC's bill was frequently delayed because it needed to satisfy CDB's request. CDB ties the payment of HSRCC bills to the satisfaction of precedent-setting requirements, such as those pertaining to the exemption or incentive of the KCJB transfer land acquisition tax, which is decided by the Government of the Republic of Indonesia rather than KCIC. An audit of the operational expenses of PSBI's land acquisition that CDB has not authorized, the satisfaction of stakeholders' equity-related commitments based on the percentage of shares held by each member of the Chinese and Indonesian SOE consortium, and other matters were requested by CDB.

CDB must approve any changes or increases to the contract price, including escalation value, Variation Orders (VO), Unforeseeable Physical Conditions, and others, before they can be paid.

2. Replacement of Sub-Clause 4.12 Unforeseeable Difficulties

Based on the General Requirements for EPC/Turnkey Projects related to Sub-Clause 4.12, Unforeseeable Difficulties are already the responsibility of the contractor, and the contract price cannot be adjusted considering these Unforeseeable Difficulties. However, in the Particular Conditions of Contract (PCC), the JBHSR Sub-Clause 4.12 contract is replaced with Sub-Clause 4.12 Unforeseeable Physical Conditions of the Conditions of Contract for Plant and Design – Build [5].

If the Contractor encounters adverse physical conditions that it deems unforeseeable, the Contractor shall notify the Engineer as soon as practicable. If and to the extent that the Contractor encounters unforeseeable physical conditions, gives such notice, and is delayed and/or incurs Costs due to these conditions, the Contractor reserves the right to be subject to Sub-Clause 20.1 [Contractor Claims].

This Sub-Clause 4.12 is one of the differences between EPC contracts and Design-Build contracts. With the replacement of Sub-Clause 4.12, the JBHSR project Contractor has the right to submit a claim if it finds Unforeseeable Physical Conditions.

The KCIC budget for Unforeseeable Physical Conditions is equal to two percent of the cost of civil work. The contractor filed a claim that was much larger

than the allocated budget because of the unforeseeable physical conditions. The contractor is still handling claims pertaining to Unforeseeable Physical Conditions, given that these conditions arise because of the brief tender process and the lack of available land at the time of the tender, which prevents the contractor from conducting a soil investigation and verifying the state of the land that influences the contractor's bid price and design.

CONCLUSION

Based on the description above, we can see that the 4 notes contained in the Introductory Note to the First Edition of the Silver Book of EPC Contracts related to the provisions when this EPC/Turnkey contract is not suitable for use, are found all in the KCJB project:

1. The tender time of only 2 months is very inadequate and insufficient for a large and complex EPC Project tender.
2. The work along the JBHSR Project trajectory is mostly underground work such as tunnels, bridge foundations and part of sub-grade excavation work.
3. Although KCIC has given Employer's Requirement (ER) to HSRCC, it always closely supervises and controls the contractor's work.
4. Every payment of bills from the contractor, approval must be obtained from the China Development Bank (CDB) as the lender of this KCJB project.

In addition, by changing Sub-Clause 4.12 in the Particular Conditions of Contract (PCC) to Unforeseeable Physical Conditions, this EPC contract is not appropriate to be used in the Jakarta Bandung High Speed Railway project. FIDIC recommends that the Contractual Provisions for Plant and Design Build be used in circumstances where all 4 of the above notes are found for Works designed by (or on behalf of) the Contractor.

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