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# *Due Diligence checklist for* [insert project name]

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Draft – February 2016

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# ***Due Diligence Checklist – Acquisition of Power Station***

## ***1. Project Documentation***

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- (a) Have the following documents been provided?:
  - (i) draft sale and purchase agreement (either share sale or asset sale, as appropriate); and
  - (ii) all relevant documentation relating:
    - (A) to the target company (**PowerCo**); or
    - (B) to the target assets (ie the Power Station etc.).
  
- (a) These include complete and up to date copies of any of the following to which PowerCo is a party or which otherwise relate to PowerCo and its activities:
  - (i) operating licence/concession agreement;
  - (ii) other documentation relating to the role of the state in relation to the project such as state guarantees, letters of comfort or similar (**state support arrangements**);
  - (iii) power purchase agreement (**PPA**);
  - (iv) all agreements relating to the use of transmission and distribution facilities;
  - (v) joint venture agreement/shareholders' agreement [(if applicable)];
  - (vi) operating and maintenance agreement (**OMA**);
  - (vii) engineering, procurement and construction contract (**EPC Contract**);
  - (viii) service and supply agreements;
  - (ix) copies of all correspondence between PowerCo to and from the [*give name of regulatory authority[ies] eg Secretary of State for Trade and Industry*];
  - (x) insurance policies;
  - (xi) financing agreements;
  - (xii) any other outstanding agreement, arrangement or obligation as between PowerCo and any third party.
  
- (b) In relation to the Power Station:
  - (i) copies of all files and records, including records relating to testing, heat rate, capacity, performance (eg against despatch instructions), maintenance records, outages (scheduled and unscheduled);

- (ii) copies of all budgets, accounting statements, operating committee/sub-committee minutes;
- (iii) copies of all communications with [*regulatory authorities, eg the Department of Trade and Industry*] and third parties for the past five years; and
- (iv) details of:
  - (A) any breach (by PowerCo or any third party) of any agreements, arrangements, laws or regulations relating to the Power Station (including copies of any notice of the same);
  - (B) outstanding obligations or financial commitments under any of the project agreements or any licences/approvals;
  - (C) any notice or removal or resignation of the Operator (or any proposal for the same);
  - (D) any actual or potential disputes between PowerCo and any other person;
  - (E) any pre-emptive or other similar rights exercisable upon a change of ownership or control of PowerCo;
  - (F) any security interest in existence over or in respect of the Power Station or any related assets or any of the project agreements;
  - (G) any other information relevant to PowerCo or its business which may be material to a potential purchaser of PowerCo shares.

## **2. Regulatory Framework**

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- (a) What regulatory approvals are required in the host state in order to operate the Power Station? What legislation governs the grant of these approvals? Are these approvals (eg licences) in full force and effect?
- (b) What regulatory approvals are required to be obtained prior to (a) acquisition and (b) transfer of an interest in power generation facilities (eg prior consent of regulator or Minister of State or any other authority in existence)? Have all such approvals been obtained? Is approval required prior to a change in control of PowerCo?
- (c) What regulatory restrictions apply to owners of power generation facilities? (eg are there restrictions on the type of project vehicle? Is there a "local ownership requirement"? Are there restrictions on transfers of shareholdings in the project company?)
- (d) Have any state support arrangements or guarantees been provided? If so, do these contain a waiver of sovereign immunity?
- (e) Where state support arrangements or guarantees have been provided, will these continue in effect following the asset or share sale?

- (f) Review relevant legislation, regulations and licence conditions/concession agreement/other state support arrangements for potential areas of concern, eg:
- (i) how much influence does the government of the host state have over the day-to-day running of the Power Station? Which regulatory authorities will be involved? What is the division of responsibility between them?
  - (ii) does the state have/require a participating interest in the relevant power generation assets (eg strategic interest in PowerCo, vote on operating committee etc.)? If so, how is this (or how will this be) structured?
  - (iii) in what circumstances may the state (or its government) transfer operation of the Power Station to another party (eg in times of "national emergency"?)
  - (iv) are there limits (or "price controls") on the prices PowerCo would be permitted to charge? What arrangements have been made to deal with the risk of regulatory interference in pricing, or the risk of non-approval of a proposed Tariff?
  - (v) are there any restrictions on PowerCo's ability to import materials or labour?
  - (vi) in what currency will the Tariff under the Power Purchase Agreement (**PPA**) be paid? If the Tariff is paid in a different currency to that in which debt service obligations are owed, what protection will PowerCo have against exchange rate fluctuations? Will PowerCo be able freely to convert local earnings into other currencies? What restrictions apply in relation to the transfer of funds in and out of the jurisdiction? Will PowerCo be able to maintain accounts outside the jurisdiction? Are there any restrictions on the ability of PowerCo to hold foreign currency accounts within the jurisdiction? Are there any foreign exchange regulations in the jurisdiction?
  - (vii) what happens to the Power Station at the end of the licence/concession term? What environmental or clean-up obligations will apply to PowerCo?
  - (viii) what would be the consequences of an event of force majeure affecting the ability of PowerCo to comply with regulatory and legal requirements?
  - (ix) what would be the consequences of a "change in law" (eg a change in taxation, the introduction of new taxes, or a change in the law relating to environmental liability etc.) affecting (a) PowerCo's operating costs and revenues (b) return to shareholders (c) the ability of PowerCo to comply with its regulatory or contractual obligations or (d) Available Capacity?
  - (x) what protections exist for PowerCo in the event of restructuring and/or deregulation of the electricity industry during the term of the project?
  - (xi) for what period are the necessary governmental consents for the project granted? Which (if any) consents will need to be renewed during the term of the project? How is PowerCo protected in the event that (through no fault its own) governmental consents necessary to carry on the project are revoked (or not renewed), or their terms materially changed?
  - (xii) are there any restrictions on the ability of PowerCo to give security over all or part of the Power Station (or its rights under any of the project agreements) to its Lenders?

- (xiii) are the sums which may become due under the project documentation (particularly any termination sums) recoverable? Where contractual commitments are made by the host state or any of its departments, entities or representatives on behalf of the host state, has a waiver of sovereign immunity been given?

### **3. The Licence/Concession**

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- (a) Is PowerCo the legal and beneficial owner of the relevant licence/concession interests? If not, who?
- (b) Is the licence/concession agreement in full force and effect? Has there been any notice of any breach of the terms of the licence/concession agreement by (a) PowerCo or (b) Operator or (c) any other person? Has any event occurred which might cause the licence/concession agreement to be revoked?
- (c) Are licences/concessions granted on uniform terms? Or do they vary from project to project?
- (d) What is the term of the licence/concession agreement? Are renewals normally granted if requested? Will renewal fees be payable?
- (e) In what circumstances may the licence/concession agreement be terminated? What are the consequences of termination? Would PowerCo be entitled to compensation? If so, in what circumstances?
- (f) To what extent may the terms of a licence/concession agreement be varied?
- (g) Are there restrictions on PowerCo's ability to dispose of its interests under the licence/concession agreement? What consents are required? Have these consents been obtained?

### **4. Relevant Assets**

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Is PowerCo the legal and beneficial owner of the relevant power generation assets (including associated plant and machinery necessary for the operation of those assets)? If not, who?

### **5. PPA**

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- (a) Who is the purchaser of power (the **Offtaker**) under the PPA? Is the Offtaker state-owned, state-controlled, publicly or privately-owned? If state-owned or controlled, is there any likelihood that the Offtaker may be privatised during the term of the PPA? Is the Offtaker creditworthy/technically capable? Are its obligations guaranteed in the terms of any state support arrangements?
- (b) Must PowerCo supply exclusively to the Offtaker? Does the Offtaker have a monopoly over electricity supply?
- (c) Is the Offtaker reliant on a grid operator/distribution company to deliver electricity to the supply point? If so, is the grid operator/distribution company creditworthy/technically capable?
- (d) Is the PPA in effect? Have all the conditions precedent been satisfied?

- (e) What is the term of the PPA? Does it correspond with the terms of the other project agreements? Is the term of the PPA (commencing with the Commercial Operations Date) at least as long as the expected term of financing arrangements?
- (f) Are the necessary transmission facilities installed and operational? If not, who bears the risk of non-completion? What compensation is paid for delays? Is the compensation sufficient to cover PowerCo's costs (including debt service costs)?
- (g) Review the PPA for areas of potential concern, eg:
  - (i) how is the Tariff calculated? Which costs are "passed through" to the Offtaker under the PPA, and how? Which must be borne by PowerCo? What is the situation in the event of an increase in the costs of operating the Power Station (eg following a change in law)? Will increased costs be "passed through" in accordance with a pre-agreed escalator, or by reference to actual costs?
  - (ii) who bears the risk of continued availability of (a) the Power Station (b) transmission facilities and (c) distribution facilities? See also queries relating to force majeure below. What penalties will PowerCo suffer under the PPA in the event of a failure to meet a Despatch instruction? Will penalties affect the ability of PowerCo to meet its debt service obligations?
  - (iii) are bonuses payable under the PPA? If so, in what circumstances?
  - (iv) who bears the risk that the Power Station is not Despatched by the Offtaker?
  - (v) when are payments required from the Offtaker? What is the situation in the event of (a) non-payment or (b) a billing dispute?
  - (vi) how is liability apportioned between PowerCo and the Offtaker in the event of death, injury, or damage to property? Do any limitations on liability or exclusions apply? Are any indemnities given? Are the liability provisions reciprocal?
  - (vii) how is force majeure defined in the PPA? How are labour disputes treated in the PPA's force majeure provisions? What are the consequences of an event of force majeure affecting (a) PowerCo and (b) the Offtaker? How does an event of force majeure impact upon the Tariff?
  - (viii) how are disputes under the PPA to be resolved?
  - (ix) in what circumstances may the PPA be terminated? What cure periods are permitted? What are the consequences of termination? What provision has been made for compensation in these circumstances?
  - (x) how is "change in law" defined? Are discriminatory as well as non-discriminatory changes covered? If so, how is "non-discriminatory" defined?

- (xi) what protection does PowerCo have in the event of a change in law affecting (a) PowerCo's capital requirements, operating costs and revenues (b) return to shareholders (c) the ability of PowerCo to comply with its regulatory or contractual obligations or (d) Available Capacity?
- (xii) what restrictions apply in relation to the assignment or transfer of rights or obligations under the PPA? Are there any restrictions on PowerCo's ability to give security to Lenders?

## ***6. Engineering, Procurement and Construction (EPC) Contract***

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- (a) In addition to the issues outlined above, the due diligence report will also need to deal with the risks associated with the construction of the Power Station, and the interconnection, transmission and distribution facilities necessary to deliver electricity to prospective Offtakers, ie:
  - (i) what is the contract price? To what extent is the contract price subject to revision or adjustment? What milestones will trigger payments under the contract? Are there criteria by which completion of EPC milestones will be able to be objectively determined? What evidence is required that milestones have been met? In what circumstances may payments be withheld? How flexible is the payment schedule? What are the consequences of delay due to PowerCo's default?
  - (ii) how is the Commercial Operations Date (**COD**) established? In what circumstances may extensions to deadlines under the EPC Contract be claimed? What incentives are there to ensure that the EPC Contractor completes its work on time? What are the consequences of late or non-completion? Will liquidated damages be payable? If so, how are damages calculated? Is there a cap on the amount of damages payable? Will the level of compensation be sufficient to enable PowerCo to cover its costs (including its debt service costs?). At what point will PowerCo be permitted to terminate the project? What are the consequences of termination by PowerCo?
  - (iii) when does ownership in work and materials pass to PowerCo?
  - (iv) what are the industry standards to which the EPC Contractor must comply?
  - (v) is any performance security required?
  - (vi) to what extent is the EPC Contractor required to "put right" defective work? Does a defects liability period apply? What is the effect of a final certificate issued at the end of the defects liability period? What is the position in respect of latent defects? Does a limitation period apply? What rights does PowerCo have should the EPC Contractor fail to carry out the necessary corrective work?
  - (vii) what recourse does PowerCo have in the event of errors in design or construction? Do time limits apply?



- (viii) what performance tests are required? What are the target capacity parameters for the Power Station? What are the consequences of a failed performance test? In what circumstances may PowerCo refuse to take over the Power Station? What rights of access do the offtaker and operator and lenders have doing the performance tests? Are there provisions governing revenue earned during the Performance Tests?
  - (ix) how is liability apportioned between PowerCo and the Operator in the event of death, injury, or damage to property? Do any limitations on liability or exclusions apply? Are any indemnities given?
  - (x) what control does PowerCo have over the sub-contracting arrangements entered into by PowerCo?
  - (xi) how is force majeure defined? What are the consequences of force majeure? At what point may the EPC Contract be terminated for reasons of prolonged force majeure, and by whom?
  - (xii) in what other circumstances may the EPC Contract be terminated? What are the consequences of termination by either party? Is the EPC Contractor entitled to any payment for work done, or loss of profits? What would be the status of sub-contracts entered into by the EPC Contractor?
  - (xiii) what insurance is required to be obtained by the EPC Contractor? Must insurance policies include PowerCo (and its Lenders) as co-insureds? Do insurance policies include a waiver of subrogation in respect of PowerCo and its Lenders? Does the EPC Contract expressly require compliance by the EPC Contractors with the terms of insurance policies?
  - (xiv) how will disputes under the EPC Contract be resolved?
- (b) Is there a clear date by which the necessary transmission and distribution facilities must be completed? Is there a clear date by which the necessary fuel supply facilities must be completed? In each case, who will bear the risk of late or non-completion? Is there a limit on delays? If so, what are the consequences of non-completion by this date?
  - (c) Are there any warranties (eg from sub-contractors) issued pursuant to the EPC Contract which are still in force? Where an asset sale is proposed, can the benefit of such warranties be transferred or are there restrictions on their assignment?

## ***7. Operation and Maintenance Agreement (OMA)***

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- (a) Who is the Operator? What is the nature of the legal relationship between the Operator and PowerCo (eg independent contractor)? Specifically, is the Operator entitled to enter into binding arrangements on behalf of PowerCo?
- (b) Is the Operator creditworthy/technically capable? Have any notices been received by the Operator or PowerCo or any other person in relation to the Operator's performance? What information is available as regards the Operator's health and safety and environmental record? Do the minutes of any operating committee meetings reflect any concerns on the part of PowerCo or any other person regarding past health and safety and environmental performance? What is the Operator's record in relation to other labour matters?

- (c) Does the term of the OMA correspond with the term of the PPA (including any extensions)?
- (d) Do the provisions of the OMA create adequate incentives to minimise costs and to operate the Power Station efficiently? To what extent are cost savings and losses under the PPA (due to efficiency gains and losses in the operation of the Power Station) passed through to the Operator?
- (e) Review the OMA for areas of potential concern, eg:
  - (i) consistency with PowerCo's regulatory and contractual obligations (including the provisions of any licence or concession agreement) and with Good Operating Practice.
  - (ii) rights of access and inspection.
  - (iii) what is the procedure for agreeing operating budgets, eg how are voting rights determined?
  - (iv) what are the consequences for (a) PowerCo and (b) the Operator in the event that the Operator exceeds a budget?
  - (v) what procedures apply in relation to the conduct of litigation?
  - (vi) to what extent are PowerCo's liabilities under the OMA able to be "passed through" to the Offtaker under the PPA Tariff? Are bonuses payable by PowerCo to the Operator (ie for reducing operating costs)? Are these costs (ie payment of bonuses) passed through to the Offtaker?
  - (vii) what is the timing of payments under the OMA, relative to timing of payments under other project agreements?
  - (viii) how is liability apportioned between PowerCo and the Operator in the event of death, injury, or damage to property? Do any limitations on liability or exclusions apply? Are any indemnities given? Are the liability provisions reciprocal?
  - (ix) how are employees and sub-contractors selected?
  - (x) in what circumstances may the OMA be terminated? Do cure periods under the OMA match the corresponding cure periods under the PPA? What are the consequences of termination of the OMA?
  - (xi) how are disputes under the OMA to be resolved? Does the determination of a dispute under the PPA have any bearing on the rights and obligations of the Operator under the OMA?
  - (xii) what restrictions apply in relation to the assignment or transfer of rights or obligations under the OMA? Are there any restrictions on PowerCo's ability to give security to Lenders?

## **8. Other Facilities/Services**

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- (a) What additional facilities/services are required to be installed (eg water supply, transportation infrastructure)? Who will bear the risk of late or non-completion? What are the consequences of late or non-completion?
- (b) To what extent would PowerCo be dependent on any other (including state-operated) infrastructure or facilities (eg roads, rail, water supply). How reliable are these? How is PowerCo protected in the event of a failure of any of these services? What remedies are available?
- (c) Under what terms will these facilities/services continue to be available? For instance, are state-operated facilities/services contingent upon the state's continued involvement in the Project (eg as a shareholder or pursuant to state support arrangements)? What are the consequences in the event that (a) the state ceases to be a party to the project agreements or (b) state support arrangements are terminated?

## **9. Insurance**

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Does insurance conform to: (a) regulatory and contractual requirements; and (b) Good Industry Practice? To what extent does insurance mitigate potential areas of exposure for PowerCo under the project agreements?

## **10. Financing**

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- (a) Review in detail current financing arrangements entered into by PowerCo (in case of a proposed share sale).
- (b) Are there any restrictions on the ability of PowerCo [or its holding company] to give security over all or part of the Power Station (or rights under any of the project agreements) to its Lenders?
- (c) What, if any security interests have been created over (a) the Power Station (b) the project agreements and (c) other relevant assets?
- (d) What will be the consequences of a default under the financing arrangements? Do Lenders enjoy "step in" rights in relation to the operation of the Power Station? If so, in what circumstances? How much notice must be given?

## **11. Export-Credit Arrangements**

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- (a) Has support in the form of export-credits been sought in relation to the project? If so, what conditions are likely to apply? Are these conditions reflected in the EPC Contract?
- (b) If so what are the intercreditor arrangements?
- (c) Is there any government funding or feed in tariff arrangement?

## ***12. Litigation and Disputes***

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- (a) What claims are currently outstanding against PowerCo? Have any matters been submitted to dispute resolution which have not yet been resolved?
- (b) Are there any circumstances which might give rise to a future claim? Are there any matters currently in dispute (a) between the parties to any of the relevant project agreements or (b) between those parties and any third party?

## ***13. Health and Safety/Environmental***

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- (a) What information is available as regards the health and safety and environmental record of (a) PowerCo (b) the Operator or (c) any other person in relation to the operation the Power Station (and associated activities)?
- (b) Have any notices, fines or other claims been served or issued by any court or regulatory authority relating to the health and safety or environmental performance of (a) PowerCo or (b) the Operator or (c) any other person in relation to the operation the Power Station (and associated activities)? Are there any circumstances which could give rise to the issue of such a notice, fine or claim?
- (c) What happens at the end of the project term? What environmental or clean-up obligations will apply?

## ***14. Taxation***

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What additional taxes, royalties, depletion fees or import or export payments may be payable over and above licence/concession fees? How are these assessed?

## ***15. Draft Sale and Purchase Agreement***

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Review carefully the Draft Sale and Purchase Agreement, including, in particular, conditions precedent and warranties.