



Australian Government

Department of Sustainability, Environment, Water, Population and Communities

DEED OF VARIATION

**Deed of Variation to Funding
Agreement in relation to the Clarence
Colliery Water Transfer System
Upgrade**

Commonwealth of Australia as represented by
the Department of Sustainability, Environment,
Water, Population and Communities ABN 34 190
894 983 (**Department**)

City of Lithgow Council ABN 59 986 092 492
(**Recipient**).

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Details

Parties

1. Commonwealth of Australia as represented by the Department of Sustainability, Environment, Water, Population and Communities ABN 34 190 894 983 of John Gorton Building, Environment Entrance, King Edward Terrace, Parkes ACT 2600, Australia (**Department**).
2. City of Lithgow Council ABN 59 986 092 492 of 180 Mort Street, Lithgow NSW 2790 (**Recipient**).

Recitals

- A. The Department, then using the name of the Department of the Environment, Water, Heritage and the Arts and the Recipient, City of Lithgow Council are parties to a Funding Agreement in relation to the Clarence Colliery Water Transfer System Upgrade dated 31 May 2010 (**Original Agreement**).
- B. The parties varied the Original Agreement on 13 March 2012 (**First Variation**).
- C. The Department and the Recipient have agreed to amend the terms of the Original Agreement referred to in Recital A, as amended by the First Variation (together the **Agreement**) in accordance with this deed.
- D. The Department and Recipient agree that:
 - i. due to delays in the delivery of milestones, and
 - ii. representations made by the Recipient,the total Funds payable under the Agreement has been reduced to \$3,143,493.21.
- E. As a consequence of these delays, the availability of the 2011/12 unexpended funds in the 2012/13 financial year will be subject to Commonwealth budgetary processes.

Agreed terms

1. Defined terms and interpretation

1.1 Defined terms

In this deed, except where the context otherwise requires, defined terms have the same meaning as given to them in the Agreement.

1.2 Interpretation

In this deed, except where the context otherwise requires:

- (a) the singular includes the plural and vice versa, and a gender includes other genders;
- (b) another grammatical form of a defined word or expression has a corresponding meaning;
- (c) a reference to a clause, paragraph, schedule or attachment is to a clause or paragraph of, or schedule or attachment to, this deed, and a reference to this deed includes any schedule or attachment;
- (d) a reference to a document or instrument includes the document or instrument as novated, altered, supplemented or replaced from time to time;
- (e) a reference to AUD, A\$, \$A, dollar or \$ is to Australian currency;
- (f) a reference to time is to the local time in Canberra, Australia;
- (g) a reference to a party is to a party to this deed, and a reference to a party to a document includes the party's executors, administrators, successors and permitted assigns and substitutes;
- (h) a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity;
- (i) headings are for ease of reference only and do not affect interpretation;
- (j) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (k) a word or expression defined in the *Corporations Act 2001* (Cth) has the meaning given to it in the *Corporations Act 2001* (Cth);
- (l) the meaning of general words is not limited by specific examples introduced by **including, for example** or similar expressions;
- (m) any agreement, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally;
- (n) any agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally; and
- (o) a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of this deed or any part of it.

2. Variation to Agreement

With effect from the date of this deed, the Agreement is varied by:

- (a) in Recital F, deleting the text and inserting "The parties rely on:
 - i. GSTR2006/11 for all payments made in connection with this Agreement prior to 27 June 2012 ; and
 - ii. section 9-17(3) of the *A New Tax System (Goods and Services Tax) Act 1999* for all payments made on or after 27 June 2012,

in determining that no GST is payable in connection with payment of Funds under this Agreement.”;

- (b) in clause 5.2.1, deleting the text and inserting "On the basis that the Funding paid under this Agreement is:
 - a. of a non-commercial, funding nature;
 - b. paid to a 'government related entity' for GST Act purposes; and
 - c. sourced from an appropriation;

the parties rely on:

- d. GSTR 2006/11 for all payments made in connection with this Agreement prior to 27 June 2012; and
- e. section 9-17(3) of the *A New Tax System (Goods and Services Tax) Act 1999* for all payments made on or after 27 June 2012,

in determining that the payment of Funding is not consideration and that no GST is payable in respect of payment of Funding under this Agreement.”;

- (c) in item A.2.1, deleting "2012" and inserting "2013”;
- (d) in item A.2.3, deleting the text and inserting:

Milestone	Date
Milestone 1: Signing of the Funding Agreement.	30 May 2010
Milestone 2: Revised Project plan provided to the Department. The project plan should include a revised risk plan and stakeholder communication strategy.	4 June 2010
Milestone 3: Meeting with DSEWPaC Approvals and Wildlife Division to discuss potential EPBC referral.	14 July 2010
Milestone 4: Subject to the	1 September 2010

Department's prior written approval, engage consultants for design and environmental assessment.	
Milestone 5: Stakeholder and community consultation undertaken and report provided to the Department on issues raised and how these will be addressed by the Recipient. Provision of revised communication strategy if required.	8 October 2010
Milestone 6: Additional hydrological studies finalised. Draft Environmental Assessment and Preliminary Design provided to the Department.	2 March 2011
Milestone 7: Pre-referral meeting with DSEWPaC Approvals and Wildlife Division.	2 March 2011
Milestone 8: Formal advice provided to the Department outlining the outcome of the Recipient's investigation into the ownership of the land through which the pipeline will pass.	9 March 2011
Milestone 9: First progress report provided to the Department.	9 March 2011
<p>Milestone 10: Provision of final design to the Department. This includes provision to the Department of:</p> <ul style="list-style-type: none"> - Confirmation that all necessary environmental and other approvals have been obtained, including: <ul style="list-style-type: none"> (i) Land owner consent from Centennial Coal for the pipeline to traverse the coal lease area; (ii) Occupation certificate from Forestry NSW (if required); (iii) approvals under the EPBC Act (if required); (iv) Part 5 approval for assessment of works under the EP&A Act; and (v) Approval of design by Mine Subsidence Board. - Evidence that necessary arrangements have been put in 	30 September 2012

<p>place with Centennial Coal to ensure ongoing access to water in the event of mine closure.</p> <ul style="list-style-type: none"> - Details of the Recipient's proposed strategy for obtaining State Government approvals to continue to manage the infrastructure in the event of mine closure. - Confirmation regarding the ownership of assets. - A revised project plan. - A final project budget and evidence of additional contributions to the project in the event that revised project costs exceed Funding. - Evidence of Lithgow City Council's resolution to proceed to tender. 	
Milestone 11: Evidence that Lithgow City Council has accepted a tender and a contractor has been engaged.	10 December 2012
Milestone 12: Provision of a review acceptable to the Department of progress on construction works.	20 March 2013
Milestone 13: Evidence of the completion of construction works.	1 June 2013
Milestone 14: Provision of a final report, including audited financial statements, acceptable to the Department.	23 June 2013

(e) in item B.1.1 of Schedule 1, deleting the text and inserting:

The total Funding for the Activity is \$3,143,493.21 GST exclusive. Subject to the terms of this Agreement (including this Item B), the Funding will be paid as follows:

Payment Number and type	Timing for payment	GST-exclusive amount
1. Initial payment	Completion of Milestone 1.	\$280,000
2. Progress	Completion of Milestones 2 and eight elements of milestone 10.	\$247,493.21
3. Progress	Completion of remaining elements of Milestone 10.	\$600,000
4. Progress	Completion of Milestone 11.	\$900,000
5. Progress	Completion of Milestone 12.	\$300,000
6. Progress	Completion of Milestone 13.	\$416,000
7. Final	Completion of Milestone 14. Acceptance of final report.	\$400,000

(f) in item D.1.1 of Schedule 1, deleting the text and inserting:

The Budget for the Activity is specified in the following table.

Expenditure Item	Funding (GST exclusive)	Recipient Contributions (GST exclusive)	Other Contributions (GST exclusive)	Total Cost (GST exclusive)
Environmental Assessment and Design	\$280,000	\$0	\$0	\$280,000
Regulatory Approvals	\$6000	\$0	\$0	\$6000
Procurement for Professional Services and Construction	\$28,400	\$0	\$0	\$28,400
Construction	\$2,433,719.61	\$0	\$0	\$2,433,719.61
Project Management	\$54,000	\$0	\$0	\$54,000
Contingencies	\$397,373.60	\$0	\$0	\$397,373.60

3. Payment acknowledgement

The parties acknowledge that the amount of \$527,493.21 has already been paid to the Recipient as part of the Funds payable under the Agreement.

4. Continued force and effect of Agreement

The Agreement continues in full force and effect, as amended by this deed.

5. Miscellaneous

5.1 Counterparts

This deed may be executed in counterparts. All executed counterparts constitute one document.

5.2 Governing law and jurisdiction

This deed is governed by the law of the Australian Capital Territory and each party irrevocably submits to the non-exclusive jurisdiction of the courts of the Australian Capital Territory.

Execution page

Executed as a deed

SIGNED SEALED AND DELIVERED for and on behalf of the Commonwealth of Australia as represented by the **Department of Sustainability, Environment, Water, Population and Communities** by a duly authorised representative

Name of authorised representative (print)

Name of witness (print)

Signature of authorised representative

Signature of witness

Date

Date

SIGNED SEALED AND DELIVERED for and on behalf of City of Lithgow Council ABN 59 986 092 492 by a duly authorised representative who warrants that they have the authority to sign this deed on behalf of Lithgow City Council

Name of authorised representative (print)

Name of witness (print)

Signature of authorised representative

Signature of witness

Date

Date

ITEM **OPER - 13/08/12 - VARIATIONS TO CONTRACT WITH GHD FOR ENVIRONMENTAL ASSESSMENT AND DESIGN OF THE CLARENCE COLLIERY WATER TRANSFER SYSTEM**

REPORT FROM: **I STEWART – GROUP MANAGER OPERATIONS**

REFERENCE

Ordinary Meeting of Council 13/12/2010

SUMMARY

This reported provides details on a number of variations to the original contract that was approved by Council, following the engagement of GHD to undertake an Environmental Assessment and Design for the Clarence Colliery Water Transfer System.

COMMENTARY

With reference to the attachments the total value of the contract variations being sought by GHD is \$104,500 and includes three separate items.

Two of these items were not included in the original Tender submitted by GHD and represent additional works over and above the works requested at the time of the Tender. These include the Tender package documentation which allows Council to proceed to call Tenders using prepared Contract documents and documentation valued at \$18,800 and the ecological study and amending existing draft REF for the section of pipeline between the Colliery pumping station and Council's receiving tanks valued at \$41,200.

The third variation involves a pump station design and rising main design for the section of the pipeline from the Colliery pump station to Council's receiving tanks valued at \$44,500. This variation is required as the original tender presented by GHD made the assumption that the existing pump station and the existing rising main would be capable of delivering the required design flows. A more detailed assessment of the existing infrastructure confirms that this is not the case, thus requiring a detailed design for a new pipeline and pump station. Completion of the works covered by these variations will place Council in a position to call tenders for the construction of all civil works associated with the upgrade by early October

POLICY IMPLICATIONS

NIL

FINANCIAL IMPLICATIONS

These variations will be funded from the grants provided for this project from Federal Government

LEGAL IMPLICATIONS

NIL

ATTACHMENTS

1. Submission by GHD

RECOMMENDATION

THAT Council accept the following variations totalling\$104,500 excluding GST:

1. Pumping Station design and Rising Main design - \$44,500
2. Ecological Study - \$19,120
3. Amending existing Draft REF \$22,080
4. Tender package documentation - \$18,800