

Agenda Item No.	Board Meeting Date	Open/Closed Session	Information/Action Item	Issue Date
2	04/09/12	Open	Action	03/26/12

Subject: Authorizing to the General Manager/CEO to Sign a Nondisclosure Agreement with Powell Electrical Systems, Inc. in Order to Obtain Test Reports for Breakers Installed in the New Traction Power Substations Currently Under Fabrication and Delegating Authority to the General Manager/CEO to Enter Into Nondisclosure Agreements

ISSUE

Whether or not to authorize the General Manager/CEO to 1) sign the Nondisclosure Agreement with Powell Electrical Systems, Inc. (PESI) in order to obtain test reports for breakers installed in the new traction power substations currently under fabrication, and 2) delegate authority to the General Manager/CEO to enter into nondisclosure agreements.

RECOMMENDED ACTION

- A. Adopt Resolution No. 12-04-____, Authorizing the General Manager/CEO to Sign a Nondisclosure Agreement with Powell Electrical Systems, Inc. (PESI) in Order to Obtain Test Reports For Breakers Installed in the New Traction Power Substations Currently Under Fabrication; and
- B. Adopt Resolution No. 12-04-____, Delegating Authority to the General Manager/CEO to Enter into Nondisclosure Agreements Related to Confidential Information.

FISCAL IMPACT

This action does not involve the expenditure of funds.

DISCUSSION

Regional Transit (RT) is finalizing the review of engineering design submittals for the current traction power substation procurement with Powell Electrical Systems, Inc. (PESI). The submittal for the substation breakers requires test certifications and reports specifically for the breakers. The test reports are considered proprietary information and PESI is requiring RT to sign a Nondisclosure Agreement to release the test report to RT.

There is currently no General Manager/CEO delegated authority to sign the proposed Nondisclosure Agreement with PESI (Attachment 1).

The proposed Nondisclosure Agreement has been reviewed and approved by Regional Transit's Legal department.

Because requests for Nondisclosure Agreements arise periodically, it is also recommended that the Board delegate authority to the General Manager/CEO to sign Nondisclosure Agreements, subject to prior review and approval by the Chief Counsel. This would provide the opportunity to

Approved:

Presented:

Final 3/28/12

General Manager/CEO

AGM, Engineering and Construction

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REGIONAL TRANSIT ISSUE PAPER

Agenda Item No.	Board Meeting Date	Open/Closed Session	Information/Action Item	Issue Date
2	04/09/12	Open	Action	03/26/12

Subject: Authorizing to the General Manager/CEO to Sign a Nondisclosure Agreement with Powell Electrical Systems, Inc. in Order to Obtain Test Reports for Breakers Installed in the New Traction Power Substations Currently Under Fabrication and Delegating Authority

draft any such agreement as narrowly as possible and to ensure such agreements are consistent with federal and state law, including the California Public Records Act.

NONDISCLOSURE AGREEMENT

This Nondisclosure Agreement (“Agreement”) is entered into as of March 13, 2012 (“Effective Date”) by Powell Electrical Systems, Inc. (“Powell”) and SACRAMENTO REGIONAL TRANSIT DISTRICT (“SRTD”) to govern the protection, use and disclosure of Proprietary Information (as defined below) by Powell to SRTD.

For purposes of this Agreement, “Proprietary Information” shall mean any engineering, design or other similar technical data or information, which is (a) originated by Powell, not previously published or otherwise disclosed to the general public, not previously available without restriction to others, nor normally furnished to others without compensation, and for which Powell desires to protect against unrestricted disclosure or competitive use, (b) furnished by Powell pursuant to this Agreement and (c) delivered by Powell in tangible form on any media including electronic transmission or storage, and identified at the time of its disclosure by each page or page equivalent thereof being marked with an appropriate legend indicating the data or information is deemed proprietary by Powell. Powell shall not identify data or information as proprietary that Powell does not in good faith believe to be confidential, privileged, a trade secret, or otherwise entitled to such markings.

NOW, THEREFORE, the parties hereto agree as follows:

1. Proprietary Information disclosed by Powell may be used by SRTD solely for the purpose of evaluating the work performed by Powell for SRTD. SRTD as referenced herein shall include, individually and collectively, its Affiliates, officers, directors, consultants, advisors, employees, contractors and subcontractors. To the extent SRTD intends to disclose any Proprietary Information to an Affiliate, consultant, advisor, contractor, or subcontractor, it shall, before such disclosure, require such Affiliate, consultant, advisor, contractor, or subcontractor to observe the nondisclosure obligations of this Agreement and provide a written acknowledgment that it has read, understands, and agrees to be bound by the terms of this Agreement. For purposes of this Agreement, “Affiliate” with respect to SRTD, means any entity controlled, directly or indirectly, by SRTD, any entity that controls, directly or indirectly, SRTD, or any entity directly or indirectly under common control with SRTD. For this purpose, “control” of a party means ownership of a majority of the voting power of that party.
2. Except as provided in Paragraph 3, SRTD will neither disclose to any unauthorized third party nor use the Proprietary Information it receives for any purpose other than for evaluating the work performed by Powell unless Powell shall expressly agree otherwise in writing. SRTD agrees to take reasonable and appropriate measures to keep Proprietary Information received hereunder private; to safeguard such Proprietary Information from theft or loss; and to limit access to Proprietary Information to those who reasonably require access to the Proprietary Information for carrying out the purpose of this Agreement. In all events, SRTD shall exercise with respect to such information the same degree of care used to protect its own proprietary and non-public information of similar importance.
3. SRTD is a California public agency. In the event of a California Public Records Act request (Cal. Govt. Code SS6250 et seq) seeking documents defined by this Agreement as “proprietary information”, SRTD will contact Powell before any protected documents are released. If Powell objects to the release of such documents, Powell will either (a) take appropriate legal action to prevent the release of such documents, or (b) advise SRTD that it believes the documents are legally exempt from disclosure and agree to defend and indemnify SRTD in the event that the party requesting the documents files suit to compel the release of the documents.

NONDISCLOSURE AGREEMENT

4. Data or information shall not be considered Proprietary Information for purposes of this Agreement if it:
 - a. is or becomes a part of the public knowledge or literature or becomes publicly available other than as a result of a breach of this Agreement by SRTD;
 - b. was rightfully in the possession of SRTD prior to the date of disclosure by Powell;
 - c. is supplied without restriction on disclosure to SRTD by a third party which is not known to SRTD to be prohibited from disclosing such information;
 - d. is publicly disclosed pursuant to the order or requirement of a court, administrative agency, or other governmental body or pursuant to any applicable law, regulation, ruling, subpoena of a governmental authority or tribunal with competent jurisdiction; provided however, that SRTD shall provide prompt notice of such court order or requirement to Powell as provided in Paragraph 4;
 - e. was independently developed by SRTD without reference to or reliance upon the Proprietary Information; or
 - f. was developed by Powell for SRTD under contractual agreements other than this Agreement.

5. Should SRTD receive a subpoena or other judicial or administrative request or process, or become involved in any judicial or administrative proceedings of any sort, that may require SRTD to disclose Proprietary Information received hereunder, SRTD shall to the extent permitted by applicable law promptly notify Powell in writing of such request or requirement prior to disclosure so that Powell may, if it so elects, seek an appropriate protective order or otherwise seek to contest, limit or protect the confidentiality of any such requested or required disclosure. With respect to any disclosure made by SRTD pursuant to this Paragraph 4, SRTD agrees to furnish only that portion of the Proprietary Information that it reasonably determines, in consultation with its counsel, is consistent with the scope of the subpoena or demand and to exercise reasonable efforts to obtain assurance that confidential treatment will be accorded such Proprietary Information. SRTD will provide reasonable cooperation to Powell and its legal counsel with respect to performance of the covenants undertaken pursuant to this Paragraph 4.

6. The exclusive points of contact with respect to the disclosure, receipt, and control of Proprietary Information disclosed hereunder in connection with the Agreement are designated by the respective parties as follows:

Powell:	SRTD:
Matt Zeedyk	Craig Norman

Each party may change its designee(s) by written notice to the other.

7. Should SRTD become aware of any actual or suspected breach of this Agreement, SRTD shall promptly notify Powell thereof in writing and shall take all reasonable further steps requested by Powell to prevent, control or remedy any such actual or suspected breach.

NONDISCLOSURE AGREEMENT

8. SRTD agrees that money damages may not be a sufficient remedy for any breach of this Agreement and that Powell shall be entitled to injunctive or other equitable relief to remedy or prevent any breach or threatened breach of this Agreement. Such remedy shall not be the exclusive remedy for any breach of this Agreement, but shall be in addition to all other rights and remedies available at law or in equity. Notwithstanding the foregoing, SRTD's liability to Powell in connection with this Agreement and any activities undertaken in connection with the evaluation of the Proposed Transaction shall be limited to direct damages and shall exclude any other liability, including without limitation, liability for special, indirect, punitive or consequential damages in contract, tort, warranty, strict liability or otherwise.
9. Powell shall own (a) its Proprietary Information, whether or not fixed in tangible media, (b) any copies thereof, and (c) any media on which any such Proprietary Information was delivered by Powell. Neither this Agreement nor the disclosure of Proprietary Information hereunder shall be construed as granting any right or license to the Proprietary Information or to any invention, patent, or other property now or hereafter owned or controlled by Powell, nor shall any such disclosure constitute any representation, warranty, assurance, or guaranty, with respect to non-infringement of patent or other rights of others. No warranty or representation as to the accuracy, completeness or technical or scientific quality of any Proprietary Information is provided herein. WITHOUT RESTRICTING THE GENERALITY OF THE FOREGOING, POWELL MAKES NO REPRESENTATION OR WARRANTIES AS TO THE MERCHANTABILITY OR FITNESS FOR USE FOR ANY PURPOSE OF THE PROPRIETARY INFORMATION. Neither Powell, its Affiliates, nor any of its principals, directors, officers, employees, attorneys and advisors (the "Representatives") shall be subject to liability resulting from the use of the Proprietary Information by SRTD. SRTD certifies that no Proprietary Information will be exported to any country in violation of applicable United States' export control laws or regulations.
10. Each party shall bear its own costs incurred under or in connection with this Agreement. Nothing in this Agreement shall be construed as an obligation by either party to enter into a contract, subcontract, or other business relationship with the other party. Nothing contained in this Agreement shall be construed to create a partnership, joint venture, or co-ownership.
11. The term of this Agreement shall be the earlier of (i) five (5) years from the Effective Date or (ii) the time at which a Proprietary Information covered by this Agreement is deemed not proprietary pursuant to Paragraph 4 hereof without breaching this Agreement ("Term").
12. Upon expiration or termination of this Agreement or upon written request by Powell, SRTD shall immediately cease use of all Proprietary Information furnished to it by Powell hereunder and shall, within thirty (30) business days, return to Powell, delete or destroy, all such written Proprietary Information in any medium, together with all copies made thereof by SRTD. Upon request, SRTD shall send Powell a certificate signed by a duly authorized officer of SRTD confirming the destruction, deletion or return of all Proprietary Information delivered hereunder.
13. This Agreement, and the rights and obligations hereunder, may not be transferred or assigned by either party without the prior written consent of the other party.
14. This Agreement shall be governed by and construed in accordance with the laws of the State of California, both as to interpretation and performance, and the Parties further expressly consent and agree that exclusive personal and subject matter jurisdiction and venue of any dispute arising out of the rights, duties and privileges created by this Agreement shall be in the state courts of Sacramento County, California or the federal courts of the Eastern District of California, as appropriate.

NONDISCLOSURE AGREEMENT

15. This Agreement constitutes the entire agreement of the parties with respect to the subject matter of this Agreement and supersedes all prior negotiations, commitments, understandings, and representations with respect thereto. No variation or modification of this Agreement or waiver of any terms or provisions hereof shall be deemed valid unless in writing and signed by authorized representatives of both parties.
16. This Agreement may be executed in counterparts, each of which shall be deemed an original but all of which shall constitute one and the same instrument. A facsimile copy of an executed original shall constitute or suffice as the original.
17. The failure of either party to insist on strict compliance with any of the terms, covenants, or conditions herein shall not be deemed a waiver of such terms, covenants, or conditions, nor shall any waiver or relinquishment of any right or power hereunder at any one or more times be deemed a waiver or relinquishment of such right or power at any other time.

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SIGNATURE PAGE FOLLOWS**

NONDISCLOSURE AGREEMENT

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed in duplicate originals by their authorized representatives.

Powell Electrical Systems Inc.

SACRAMENTO REGIONAL TRANSIT
DISTRICT

By (Signature) _____

By (Signature) _____

Name (Print) _____

Name (Print) _____

Title _____

Title _____

Date _____

Date _____

RESOLUTION NO. 12-04-_____

Adopted by the Board of Directors of the Sacramento Regional Transit District on this date:

April 9, 2012

AUTHORIZING THE GENERAL MANAGER/CEO TO SIGN A NONDISCLOSURE AGREEMENT WITH POWELL ELECTRICAL SYSTEMS, INC. IN ORDER TO OBTAIN TEST REPORTS FOR BREAKERS INSTALLED IN THE NEW TRACTION POWER SUBSTATIONS CURRENTLY UNDER FABRICATION

BE IT HEREBY RESOLVED BY THE BOARD OF DIRECTORS OF THE SACRAMENTO REGIONAL TRANSIT DISTRICT AS FOLLOWS:

THAT, the General Manager/CEO is hereby authorized to execute a Nondisclosure Agreement between the Sacramento Regional Transit District and Powell Electrical Systems, Inc.

BONNIE PANNELL, Chair

A T T E S T:

MICHAEL R. WILEY, Secretary

By: _____
Cindy Brooks, Assistant Secretary

RESOLUTION NO. 12-04-_____

Adopted by the Board of Directors of the Sacramento Regional Transit District on this date:

April 9, 2012

**DELEGATING AUTHORITY TO THE GENERAL MANAGER TO ENTER INTO
NONDISCLOSURE AGREEMENTS RELATED TO CONFIDENTIAL INFORMATION**

WHEREAS, the Sacramento Regional Transit District periodically receives requests for nondisclosure agreements related to information submitted to RT in the course of business, including requests from bidders, contractors, and third-parties with which RT has an on-going agreement; and

WHEREAS, the authority to enter into such agreements is not currently conferred upon the General Manager/CEO.

NOW, THEREFORE, BE IT HEREBY RESOLVED BY THE BOARD OF DIRECTORS OF THE SACRAMENTO REGIONAL TRANSIT BOARD AS FOLLOWS:

THAT, the Board hereby delegates authority to the General Manager/CEO to enter into nondisclosure agreements with parties contracting with RT if written or electronic material is identified by the party as confidential and where such party contends disclosure would violate a trade secret, disclose proprietary information, or violate state or federal law; and

THAT, prior to execution, any such Nondisclosure Agreement must be reviewed and approved by the Chief Counsel to ensure consistency with state law, including the California Public Records Act.

BONNIE PANNELL, Chair

ATTEST:

MICHAEL R. WILEY, Secretary

By: _____
Cindy Brooks, Assistant Secretary