

June 11, 2024

MEMO TO: BFED-21(24) File

F R O M: Yuki Lei K. Sugimura, Chair *Yuki Lei K. Sugimura*  
Budget, Finance, and Economic Development Committee

SUBJECT: **TRANSMITTAL OF INFORMATIONAL DOCUMENT RELATING TO  
JOHNSON CONTROLS, INC. ENERGY PERFORMANCE  
CONTRACT** (BFED-21(24))

The attached informational document pertains to Item 21(24) on the Committee's agenda.

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Attachment

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# BANK OF HAWAII

EQUIPMENT FINANCE  
P.O. BOX 2900  
HONOLULU, HAWAII 96846

## EQUIPMENT LEASE AGREEMENT NO. 1474

THIS EQUIPMENT LEASE AGREEMENT is made by and between BANK OF HAWAII, a Hawai'i corporation, hereinafter referred to as "Lessor", and the COUNTY OF MAUI, a political subdivision of the State of Hawai'i, whose address is 200 South High Street, Wailuku, Maui, Hawai'i 96793, hereinafter referred to as "Lessee":

### WITNESSETH:

1. **LEASE.** Lessor hereby agrees to lease to Lessee, and Lessee hereby agrees to hire from Lessor, the personal property (hereinafter referred to as the "equipment") described in Exhibit 5461 attached hereto and in any succeeding Exhibits hereto (hereinafter referred to either individually or collectively, as the context may require, as the "Exhibit"), each and every such Exhibit being incorporated herein by this reference. Lessee irrevocably authorizes Lessor to insert in the Exhibit and in any other document related to this Lease or any such Exhibit, either before or after execution of the Lease or such Exhibit or any such other document, any serial numbers or other language which Lessor deems necessary to identify the equipment.

2. **TERM.** The term of the lease for the equipment shall be as shown in the Exhibit.

3. **RENT.** As rent for all of the equipment listed on the Exhibit, Lessee agrees to pay Lessor the amount stated in the Exhibit; provided, however, that (a) Lessor reserves the right to increase or decrease the amount of the rent payment at any time before the equipment is conditionally accepted by Lessee, and (b) if the purchase price of the equipment is different than the amount set forth in the Exhibit, Lessor may adjust the lease rent to reflect the amount of any such difference. Rent shall be paid monthly or annually, in advance or in arrears, each as may be set forth in the Exhibit, and without notice at Lessor's principal place of business, or at such other place as Lessor may designate by written notice to Lessee, on the same day of the month as the day the Lease term commences. Interim rent, if any, shall be payable as stated in the Exhibit. If all the equipment is not accepted at one time, rental amounts will be based upon the dates and prices of the items of equipment accepted until such time as all of the equipment has been accepted at which point the rental amounts will be combined and payable on one date as determined by Lessor in its sole discretion. Lessee agrees:

(a) To make rental and other payments when due without abatement, deduction or offset;

(b) That in the event Lessee shall be more than ten (10) days in default in the payment of any rent payment hereunder, Lessee shall pay Lessor, as additional rent, late charges as shown in the Exhibit.

(c) That if Lessee shall be deemed to have committed a total breach and default of this Lease and Lessor declares all of Lessee's obligations for the full remaining term of this Lease immediately due and payable as provided in paragraph 24 below, Lessee shall pay Lessor as additional rent, interest on the amount of default from the date Lessor declares all of Lessee's obligations for the full remaining term of this Lease immediately due and payable to the date of payment at the rate of twelve percent (12%) per annum.

With reference to Lessee's status as a political subdivision of the State of Hawai'i, the parties also agree as follows:

(i) **Rent Payments Limited to Available Funds.** The obligation of Lessee to make rent payments shall be limited to funds appropriated or otherwise made available, from time to time, by the Maui County Council (the "Council") to pay amounts due under this Lease for the fiscal year ("Fiscal Year," which, at the date of this Lease is the period from July 1 to and including the following June 30) in which such payments are due ("Available Funds"). In no circumstance shall Lessee be obligated to pay amounts due under the Lease from any source other than Available Funds, nor shall the Council be obligated in any manner to appropriate or otherwise make available Available Funds.

(ii) **Rental Payments to Constitute a Current Expense of the Lessee.** Lessor and Lessee understand and intend that the obligation of Lessee to pay rent payments under the Lease shall constitute a current expense of Lessee and shall not in any way be construed to be a debt of the Lessee, nor shall the Lease be construed to be an instrument of indebtedness, in contravention of any applicable constitutional or statutory limitation or requirement concerning the creation of indebtedness by Lessee. The Lease shall not create an immediate indebtedness for any aggregate payment which may become due during the Lease Term. The Lease, including the obligation of Lessee to pay the portions of the rent payments treated as principal and interest principal and interest, shall not be an obligation for which the full faith and credit of the Lessee is pledged. Lessor shall have no claim or lien on any revenues or other moneys of Lessee, except Available Funds. Notwithstanding any other provisions of the Lease, Lessee, in its sole and absolute discretion, may terminate the Lease as set forth in Section (iii) below.

(iii) **Non-Appropriation.** In the event sufficient Available Funds shall not be appropriated by the Council for the payment of the rental payments required to be paid in the next succeeding Fiscal Year to continue the leasing of the Equipment, Lessee may terminate the Lease, without penalty, as to all of the Equipment at the end of the then-current Fiscal Year,



and Lessee shall not be obligated to make payment of the rent payments provided for in the Lease beyond the then-current Fiscal Year. Such termination shall not be considered or treated as a default under the Lease or any other document. If the Lease is terminated under this paragraph, the Lessee agrees to surrender to Lessor the Equipment, in good order and condition and in a state of repair that is consistent with prudent use and conscientious maintenance, except for reasonable wear and tear, and to cease use of the Equipment. Upon termination of this Lease, Lessor may, at the end of the then-current Fiscal Year, remove any fixture, structure or sign added by the Lessor, which may be removed without damaging the Equipment.

(iv) Tax Clearance. Pursuant to Haw. Rev. Stat. § 103-53, any final payment to be made under any Rental payment schedule of this Lease shall be withheld from Lessor until a State of Hawaii and federal tax clearance is submitted to Lessee immediately prior to the time of final payment.

(v) Non-Substitution. The Lessee agrees that in the event the Lessee exercises its right to terminate this lease in accordance with the non-appropriation provisions contained herein, the Lessee will not purchase, lease, or rent other equipment for the purpose of performing the functions and projects which were to be performed by the leased equipment for a period of one hundred eighty (180) days from the date of termination of this Lease.

**4. LICENSING, REGISTRATION AND TAXES.** Lessee agrees:

(a) To obtain and maintain, at its sole cost and expense, such licensing and registration of the equipment as is required by law. Any such document evidencing title shall show Lessor as the owner of the equipment and shall immediately be delivered to Lessor;

(b) To pay, as additional rent, an amount equal to (1) the State of Hawai'i General Excise Tax (and any increase in such tax) imposed against Lessor on the rental payments due hereunder after the date this Lease is executed, (2) any other tax (other than a tax measured solely by Lessor's net income), imposed, accrued, assessed or levied upon Lessor or the equipment by any state, federal or local government as a result of the purchase, sale, delivery, ownership, possession, use, operation, maintenance or return of the equipment or the receipt of rent hereunder, including without limitation, sales, use, personal property, ad valorem, value added, stamp, leasing, lease use and excise taxes, imposts, duties and other taxes related thereto, and (3) any recording or documentation fees related to the equipment or any collateral securing the obligations of Lessee;

(c) To pay all fines, penalties, interest, costs and expenses related to any of the foregoing in (a) and (b) above;

(d) Lessor shall not be required to contest any tax or other sum assessed by any governmental or other entity. Lessee agrees that its obligations hereunder shall survive the expiration or termination of this Lease; and

(e) To the extent permitted by law, and unless Lessor elects otherwise, Lessee shall pay all licensing and registration fees and taxes described in (a) and (b) above directly to the respective licensing, registration or taxing authority and shall, upon request by Lessor, provide evidence of such payment, in form and content satisfactory to Lessor. If any report, return, registration or statement (hereinafter collectively referred to as "Return") is required to be filed or submitted with respect to any such licensing or registration fee or tax, Lessee shall file or submit the Return. If Lessee is not permitted by applicable law to file or submit a Return in its own name, Lessee shall so notify Lessor and shall prepare and deliver to Lessor such Return, along with such related information as Lessor may request or as required to be submitted or filed with such Return, all to be accomplished by Lessee sufficiently in advance of the due date of such Return to permit timely filing by Lessor.

**5. ORDERING, DELIVERY AND INSPECTION OF EQUIPMENT.** (Applicable only if equipment is to be purchased by Lessor from a vendor.)

(a) Lessor will order the equipment for delivery to Lessee at the time and place specified in the Exhibit. Lessee shall be responsible for all costs of delivery, including without limitation, transportation, freight and shipping charges, and all costs of installation of the equipment. Lessee acknowledges that the equipment is being purchased by Lessor at Lessee's request specifically for the purpose of leasing the equipment to Lessee, that the equipment has been selected by Lessee and will be purchased from a vendor selected by Lessee and on the basis of and in accordance with specifications and requirements furnished by Lessee, and that Lessor has not held itself out as having knowledge or skill particular to the equipment or made any affirmations of fact regarding the equipment.

(b) If the vendor of the equipment fails to deliver the equipment within the time specified in the Exhibit (the "Outside Delivery Date"), either Lessor or Lessee may, at its option, terminate the Exhibit by giving the other party written notice thereof within six (6) months after the expiration of the Outside Delivery Date; provided, however, the termination of the Exhibit shall not relieve Lessee of its obligation to pay any accrued but unpaid carrying charges owed to Lessor pursuant to this Lease for any advances paid to the vendor. If, prior to delivery of the equipment, either Lessee's financial condition materially or adversely changes or its intended use of the equipment substantially changes, Lessor may, at its option, terminate this Lease by giving written notice of termination to Lessee.

(c) Lessee agrees to make, at Lessee's sole cost and expense, all necessary inspections and tests of the equipment to determine whether the equipment conforms to the specifications and requirements submitted to the vendor within the time specified in the Exhibit. At the conclusion of the period for inspection, Lessee shall, unless it rejects the equipment in accordance with paragraph 5(d) below, send Lessor an executed Certificate of Acceptance (hereinafter called "Certificate"). If Lessee fails to send the Certificate as specified, and Lessee fails to make a rejection of the equipment as required in paragraph 5(d) below, the equipment shall be deemed to be accepted by Lessee and Lessee shall immediately, upon request, provide Lessor with



the executed Certificate. Lessee agrees that Lessor shall have no liability to Lessee arising from Lessee's inspection of or failure to inspect the equipment. Lessee's acceptance (including deemed acceptance) of the equipment pursuant to this paragraph 5(c) is for the purpose of commencing Lessee's rental payments and other obligations to Lessor under this Lease, and is only for the benefit of Lessor. Such acceptance (including deemed acceptance) shall have no effect on Lessee's or Lessor's rights or claims against any vendor, manufacturer or supplier of the equipment for defects, malfunctions, damage or other equipment related problem. LESSEE SHALL NOT PUT THE EQUIPMENT TO ITS INTENDED USE, OTHER THAN FOR INSPECTING AND TESTING PURPOSES, PRIOR TO THE EXECUTION OF THE CERTIFICATE.

(d) Lessee may reject the equipment if such rejection is allowed under applicable law governing the sale of goods. If Lessee elects to reject the equipment, Lessee agrees that it shall (1) notify Lessor and the vendor in writing that the equipment has been rejected, and (2) comply with, at Lessee's sole cost and expense, all applicable laws dealing with the obligations of a purchaser incurred upon rejection of goods.

(e) If Lessor purchases the equipment by assumption or assignment of a purchase order previously issued by Lessee, Lessee agrees that (1) it shall execute a Certificate of Acceptance no later than the day of the month in which the first payment is due from Lessor under the purchase order, and (2) notwithstanding Lessor's acceptance or assumption of the purchase order, Lessee shall continue to be bound by all terms thereof.

## 6. WARRANTIES.

(a) **Vendor's Warranties.** During the term of this Lease, and during such time as Lessee renders faithful performance of its obligations hereunder, Lessor hereby assigns to Lessee any and all factory, manufacturer or dealer warranties on the equipment. All claims or actions under any warranties so assigned shall be made or prosecuted by Lessee, at its sole cost and expense, and Lessor shall have no obligation whatsoever to make any claim on any such warranty; provided, however, that to the extent any breach of warranty results in damage or liability to Lessor or Lessor's interest in the equipment, Lessor may, but shall have no obligation to, make or prosecute a claim or action in addition to or in lieu of any claim or action by Lessee. Any proceeds recovered by Lessee from any claims on any such warranties shall first be used to repair the equipment.

(b) **No Warranties by Lessor.** LESSOR MAKES NO WARRANTIES OR REPRESENTATIONS, EXPRESS OR IMPLIED, WITH RESPECT TO THIS LEASE OR THE EQUIPMENT LEASED HEREBY. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, THE EQUIPMENT IS LEASED "AS IS" AND LESSOR SPECIFICALLY MAKES NO WARRANTIES:

(1) THAT THE EQUIPMENT IS FREE OF ANY SECURITY INTEREST OR OTHER LIEN OR ENCUMBRANCE OR OF ANY RIGHTFUL CLAIM OF ANY THIRD PERSON BY WAY OF INFRINGEMENT OR THE LIKE;

(2) THAT THE EQUIPMENT IS FIT FOR A PARTICULAR USE; OR

(3) THAT THE EQUIPMENT IS IN COMPLIANCE WITH ANY APPLICABLE GOVERNMENTAL REQUIREMENTS OR REGULATIONS.

Lessee acknowledges that Lessor has no familiarity with the equipment and assumes no responsibility for the installation, adjusting or servicing thereof. Lessee agrees that Lessee shall not assert against Lessor any claim or defense arising as a result of any breach of warranty by the vendor or manufacturer or any malfunction or defect in the equipment or dissatisfaction on the part of Lessee. Lessee shall look to the manufacturer, supplier and/or vendor of the equipment and not to Lessor, for any claims related to the equipment. Lessee further agrees that under no circumstances will any claim be made against Lessor for loss of anticipated profits or other consequential or indirect damages. All such risks, as between Lessor and Lessee, are to be borne by Lessee at its sole risk and expense.

(c) **Lessee's Warranties.** Lessee represents and warrants:

(1) That it has the full power, authority and legal right to enter into and perform this Lease and any other agreements made in connection with the transactions hereunder (collectively, the "Transaction Documents");

(2) That the execution of this Lease and the Transaction Documents do not contravene any agreement to which Lessee is a party (including its constituent documents);

(3) That no mortgage, lease, security interest, lien or other voluntary or involuntary encumbrance of any type which now covers or affects any real or personal property or interest of Lessee will attach to or affect the equipment;

(4) That all credit and financial information submitted to Lessor by Lessee is true and correct;

(5) That the execution of this Lease and the Transaction Documents and Lessee's performance of obligations thereunder do not contravene any applicable federal, state or local laws, rules, regulations, codes, ordinances or guidelines, including without limitation, the procurement code applicable to Lessee.

7. **LOCATION.** During the term of this Lease, the equipment shall not be removed from the location specified in the Exhibit without the prior written consent of Lessor.



8. **LESSOR'S INSPECTION.** Lessor shall have the right at any time during normal business hours to enter the premises where the equipment may be located for the purpose of inspecting the equipment.

9. **LABELING.** During the term of this Lease, Lessee shall, at Lessee's sole expense, affix upon the equipment such labels, plates or other markings evidencing Lessor's ownership as Lessor may require. Lessee may affix, at Lessee's sole cost and expense, its business logo, name or other form of advertisement of its business to the equipment, provided, however, that Lessee shall, upon expiration of the term of this Lease, and unless Lessee purchases the equipment, remove such logo, name or such other advertisements from the equipment and restore the equipment to its condition prior to such affixation, all to be done at Lessee's sole cost and expense.

10. **USE OF EQUIPMENT.** Lessee agrees to use the equipment carefully and in accordance with the recommendations of the manufacturer and to comply with all laws, ordinances, regulations, warranty and insurance requirements relating to the use, operation or maintenance of the equipment. **LESSEE SHALL USE THE EQUIPMENT FOR BUSINESS OR COMMERCIAL PURPOSES ONLY AND NOT FOR PERSONAL, FAMILY, OR HOUSEHOLD PURPOSES.**

11. **MAINTENANCE AND REPAIR.** Lessee agrees, at its sole cost and expense, to keep the equipment in good repair, condition and working order, reasonable wear and tear excepted. Lessor authorizes Lessee to obtain whatever service the manufacturer or supplier customarily, or by law or agreement, renders, provided that all such service shall be at the sole expense of Lessee. All servicing and repair of the equipment shall be performed only by persons trained and qualified to do such servicing and repair work, and shall be done at Lessee's sole expense. All repairs and replacement parts made or added to the equipment shall become a part thereof and shall be the property of Lessor. Lessee shall maintain complete records covering the maintenance and repair of the equipment, which records shall be subject to inspection by Lessor.

12. **ALTERATIONS.** Lessee shall not make any alterations, additions or improvements to the equipment, or add any accessories thereto, without the prior written consent of Lessor. All additions, improvements and accessories of whatsoever kind and nature made or added to the equipment shall become a part thereof and shall be the property of Lessor. Lessee shall maintain complete records covering any such alterations, additions, accessories and improvements, which records shall be subject to inspection by Lessor.

13. **ATTACHMENT TO REAL PROPERTY.** Lessee shall not affix or attach the equipment to any real property without the prior written consent of Lessor. It is the intent of Lessor and Lessee that the equipment leased hereunder shall at all times remain personal property regardless of whether it becomes affixed or attached to real property, or permanently rests upon any real property or any improvements thereon. Lessee agrees, if requested by Lessor, to provide waivers (in form and substance approved by Lessor) from any person or political subdivision owning an interest in the real property upon which the equipment is placed, including without limitation, Lessee's mortgagee(s), Lessee's landlord, and the landlord's mortgagee(s), if any, waiving any rights to the equipment.

14. **LOSS AND DAMAGE.**

(a) From the date of execution of this Lease, or, if the equipment is ordered from a vendor, from the date risk of loss passes from the vendor, until the date of delivery of the equipment to Lessor upon termination of this Lease, Lessee shall bear the risk of loss, damage or destruction (hereinafter collectively referred to as "Loss") of the equipment from any and every cause whatsoever, including but not limited to fire, theft, or governmental action (includes without limitation, any action taken by a federal, state, county or other governmental agency, department, board or other authority, for any reason or cause whatsoever, including, but not limited to health, safety, national security or other public purposes, which results, either directly or indirectly, in loss, destruction, damage, seizure, condemnation or taking of the equipment), whether such loss is covered by insurance or not. **LOSS OF THE EQUIPMENT, OR OF ANY PART THEREOF, SHALL NOT RELIEVE LESSEE OF ANY OBLIGATION UNDER THIS LEASE, INCLUDING LESSEE'S OBLIGATION TO PAY RENT, UNLESS AND UNTIL SUCH TIME AS LESSEE'S OBLIGATIONS ARE TERMINATED PURSUANT TO PARAGRAPH 14(b)(2) HEREOF.**

(b) Should any of the equipment be subject to Loss, Lessor may, at its option, require Lessee to:

- or
- (1) Repair the equipment to the condition existing prior to the Loss, at Lessee's sole expense;
  - (2) Pay Lessor, in cash, an amount equal to all sums payable by Lessee to Lessor under the Lease for the equipment subject to Loss (with the interest portion of any future rental payment discounted on a present value basis).

Upon Lessor's receipt of payment under paragraph 14(b)(2), Lessor shall, subject to the rights of any insurer which has paid benefits with respect to the equipment subject to Loss, transfer to Lessee or its designee all of Lessor's remaining interest in such equipment "AS IS" and "WHERE IS". Upon receipt of payment under paragraph 14(b)(2), the rental payable hereunder shall be reduced by the amount of rent attributable to the equipment subject to Loss.

15. **HAZARDOUS MATERIALS.** Notwithstanding any other provision of this Lease, Lessee covenants and agrees that Lessee will not use the equipment to generate, manufacture, treat, handle, refine, produce, process, store, discharge, release or dispose of any Hazardous Material, except in full compliance with all applicable Hazardous Materials Laws. As used herein, the term "Hazardous Materials" means and includes any and all radioactive materials, asbestos, organic compounds known as polychlorinated biphenyls, chemicals known to cause cancer or reproductive toxicity, pollutants, contaminants, hazardous wastes, toxic substances and any and all other substances or materials defined as or included in the definition of "hazardous substances", "hazardous wastes", "hazardous materials", or "toxic substances" under, or for purposes of, the Hazardous Materials Laws. As



used herein, the term "Hazardous Materials Laws" means and includes all federal, state and local laws, ordinances and regulations, now or hereafter in effect, relating to environmental conditions or industrial hygiene, including, without limitation, the Federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601-9675; the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992k; the Hazardous Materials Transportation Act of 1975, 49 U.S.C. §§ 1801-1812; the Clean Water Act, 33 U.S.C. §§ 1251-1387; the Clean Air Act, 42 U.S.C. §§ 7401-7642; the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629; the Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-26; the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. §§ 11001-11050; and any similar state or local laws, ordinances and all regulations now or hereafter adopted, published or promulgated pursuant thereto.

16. **INSURANCE.** Lessee, at its sole cost and expense, shall procure and maintain insurance in the following amounts and covering the following risks:

(a) All risk perils (including but not limited to fire, lightning, explosion, smoke, windstorm (hurricane), water, flood, theft, vandalism, malicious mischief and extended coverage) or special cause of loss insurance in an amount which is at all times during the term of this Lease at least equal to the greatest of (i) the fair market value of the equipment or (ii) the original purchase price of the equipment or (iii) the replacement value new of the equipment and showing Lessor as a loss payee;

(b) Commercial general liability insurance (including but not limited to liability caused by the fault of Lessee, products-completed operations liability, contractual liability, personal and advertising injuries, and coverage for the contractual liability assumed by Lessee under this Lease) for and against liability or loss or injury to persons or property, or death of any person or persons, resulting from or arising out of the ownership, use, possession or operation of the leased equipment, with limits as specified in the Exhibit and showing Lessor as an additional named insured; and

(c) Owners and contractors protective liability insurance (if Lessee is a contractor) and automobile accident liability insurance in such amounts as Lessor may require from time to time and showing Lessor as an additional named insured.

All such insurance shall be maintained from the date of execution of this Lease, or if the equipment is ordered from a vendor, from the date risk of loss passes from the vendor, until the date the equipment is delivered to Lessor upon termination of this Lease (or if the equipment is lost or destroyed, until Lessee has fulfilled all of its obligations under this Lease). All such insurance shall be in a form approved by Lessor, and with carriers approved by Lessor, such approvals not to be unreasonably withheld. Lessee acknowledges that Lessor has not made the entering into of this Lease or any other related agreement or document contingent on Lessee procuring the insurance required hereunder from any insurance company designated by Lessor. Said policies shall provide that they may not be altered or cancelled without thirty (30) days written notice to Lessor. If Lessee fails to maintain any of the above described insurance, Lessor may, but shall not be required to, obtain such insurance in accordance with the provisions of paragraph 25. Lessee hereby waives, on Lessee's behalf and on behalf of any insurance carriers of Lessee, any claim which Lessee might otherwise have against Lessor from any risk required to be insured against by Lessee under this Lease. Lessee shall furnish Lessor with copies of all policies and such other evidence of insurance as Lessor may reasonably require. Lessee hereby irrevocably appoints Lessor as its attorney in fact with full power to negotiate, prosecute, settle and/or compromise all claims or actions under or pursuant to said insurance policies, and to execute in the name of Lessee any proofs of claim or loss, and to endorse the name of Lessee on any settlement, draft or check. Lessee shall cooperate in the prosecution of all claims. THE PROCEEDS OF ANY FIRE, EXTENDED COVERAGE, THEFT, COLLISION OR OTHER INSURANCE PROVIDING COVERAGE FOR RISK OF LOSS OR DAMAGE TO THE EQUIPMENT SHALL BE PAYABLE SOLELY TO LESSOR AND SHALL BE CREDITED BY LESSOR TOWARD THE PAYMENT OF OBLIGATIONS OF LESSEE UNDER PARAGRAPH 14 HEREOF, THE BALANCE OF THE PROCEEDS, IF ANY, TO BE THE PROPERTY OF LESSOR.

17. **ENCUMBRANCES.** Lessee agrees to keep the equipment free and clear of, and to defend Lessor's title against any and all levies, liens, claims and encumbrances (hereinafter collectively referred to as "Liens"), whether voluntary or involuntary, and whether arising by or through Lessee, vendors or otherwise, and to immediately notify Lessor in writing if any such Lien attaches to any item of equipment.

18. **RESPONSIBILITY FOR DAMAGES.** Lessee shall be responsible for damages or injury caused by its officers, employees and agents in the course of their employment to the extent that Lessee's liability for such damage or injury has been determined by a court or otherwise agreed to by Lessee, and Lessee shall pay for such damages and injury to the extent permitted by law, including without limitation: (a) the Non-Appropriation clause set forth in Section 3(iii) above, and (b) Section 36-41, Hawai'i Revised Statutes, setting forth requirements for "energy performance contracts" as defined therein. Any provision of this Lease (including an Exhibits, Addenda or other attachments) providing for an obligation by Lessee over and above the manner stated herein shall be null and void. The provisions of this paragraph shall survive termination of this Lease with respect to events occurring prior to such termination.

19. **OWNERSHIP BY LESSEE; TAX COVENANTS.** As between Lessor and Lessee, Lessee shall be treated as the owner of the equipment for tax purposes. However, Lessor makes no representations or warranties regarding the tax treatment of the equipment, this Lease or the payments to be made hereunder. Lessee shall have no other right, title or interest therein except as expressly set forth in this Lease. Lessee hereby covenants and agrees that:

(a) The parties anticipate that Lessor can exclude the portion of the rent payments treated as interest under this Lease from federal and State of Hawaii gross income. Lessee covenants and agrees that it will (i) complete and timely file an information reporting return with the Internal Revenue Service ("IRS") in accordance with Section 149(e) of the Code; (ii) not permit the equipment to be directly or indirectly used for a private business use within the meaning of Section 141 of the Code including, without limitation, use by private persons or entities pursuant to contractual arrangements which do not satisfy IRS



guidelines for permitted management contracts, as the same may be amended from time to time; (iii) not take any action that would cause this Lease or any related agreements to be treated as arbitrage bonds within the meaning of Section 148(a) of the Code; (iv) not take any action that would cause this Lease or any related agreements to be treated as federally guaranteed within the meaning of Section 149(b) of the Code; and (v) comply with any and all provisions and regulations applicable to establishing and maintaining the excludability of the portion of the rent payments treated as interest under this Lease from federal gross income pursuant to Section 103 of the Code, and from State of Hawaii gross income.

(b) If Lessor either (i) receives notice, in any form, from the IRS; or (ii) reasonably determines, based on an opinion of independent tax counsel selected by Lessor and approved by Lessee which approval Lessee shall not unreasonably withhold, that Lessor may not exclude the portion of any rent payment treated as interest under a Lease from federal and/or State of Hawaii gross income because Lessee breached a covenant contained herein, then Lessee shall pay to Lessor, within thirty (30) days after Lessor notifies Lessee of such determination, the amount which, with respect to rent payments previously paid and taking into account all penalties, fines, interest and additions to tax (including all federal, state and local taxes imposed on the portion of the rent payments treated as interest under such Lease due through the date of such event) that are imposed on Lessor as a result of the loss of the exclusion, will restore to Lessor the same after-tax yield on the transaction evidenced by this Lease (assuming tax at the highest marginal corporate tax rate) that it would have realized had the exclusion not been lost. Additionally, Lessee agrees that upon the occurrence of such an event, it shall pay additional rent to Lessor on each succeeding rent payment due date in such amount as will maintain such after-tax yield to Lessor. Lessor's determination of the amount necessary to maintain its after-tax yield as provided in this subsection (b) shall be conclusive (absent manifest error). Notwithstanding anything in a Lease to the contrary, any payment that Lessee is required to make pursuant to this subsection (b) shall be made only from moneys appropriated or otherwise made available, from time to time, by the County Council to pay amounts due under this Lease for the fiscal period in which the payments are due, together with any unexpended proceeds of this Lease, and any reserves or other amounts that have been deposited in trust to pay amounts due under this Lease.

20. **END OF LEASE PURCHASE RIGHTS AND OBLIGATIONS.** At the expiration of the full term of this Lease, Lessor and Lessee shall have those rights and obligations specified in the Exhibit attached hereto.

21. **SURRENDER.** Upon the expiration or earlier termination of this Lease, and subject to the provisions of paragraph 20, Lessee agrees to return the equipment to Lessor, free of all advertising or insignia placed thereon by Lessee, in good repair, condition and working order, ordinary wear and tear resulting from proper use excepted, by delivering the equipment, at Lessee's sole cost and expense, to any of the following locations selected by Lessor:

- (a) Any location within the State of Hawai'i; or
- (b) Any carrier that Lessor selects, packed and ready for shipment.

In addition, Lessee shall turn over to Lessor all records pertaining to the repair, maintenance and servicing of the equipment, all records of alterations, additions, accessories and improvements to the equipment, and all operating manuals, warranties and other documents which came with the equipment or were sent from the manufacturer, supplier or vendor.

If the equipment is not returned to Lessor when required upon the expiration of the term of this Lease, Lessee shall pay Lessor continuing rent in an amount equal to 1/30 of the monthly rental payment specified in the applicable Exhibit hereto for each day following the expiration date until the equipment is delivered to Lessor pursuant to the requirements of this Lease. Notwithstanding Lessee's payment and Lessor's acceptance of any such continuing rent, Lessee's failure to return the equipment, when required under the terms of this Lease, shall constitute a default under this Lease, unless Lessor consents in writing to continue the lease of such equipment on terms and conditions as may be set by Lessor.

22. **ASSIGNMENT BY LESSEE.** Lessee shall not, without the prior written consent of Lessor, sell, assign, sublet, lend, create a security interest in or otherwise transfer this Lease, the equipment, or any part thereof or interest therein or permit the equipment to be used by anyone other than Lessee or Lessee's employees. If Lessee is a partnership, a withdrawal or change, voluntary, involuntary, or by operation of law, of any general partner, or dissolution of the partnership, and if a limited partnership, the assignment or transfer of a majority interest of the limited partnership units, shall be deemed an assignment and transfer of this Lease. If Lessee is a corporation, any dissolution, merger, consolidation or other reorganization, or the sale or transfer of a controlling percentage of the capital stock of Lessee, or any corporation directly or indirectly controlling Lessee, or the sale of at least fifty-one percent (51%) of the value of the assets of Lessee shall be deemed an assignment and transfer of this Lease. The phrase "controlling percentage" means the ownership of, and the right to vote, stock possessing at least fifty-one percent (51%) of the total combined voting power of all classes of Lessee's capital stock issued, outstanding and entitled to vote for the election of directors.

If Lessee desires Lessor's consent to the assignment or transfer of this Lease, Lessee shall give Lessor not less than sixty (60) days prior written notice thereof. Notwithstanding any provision to the contrary, Lessor may, in addition to any other reasons supportive of refusal to consent, refuse to consent to an assignment or transfer because of an honest belief, reasonably formed:

- (a) That the proposed assignee is financially unable to perform in accordance with the terms of this Lease; or
- (b) That the use to be made of the equipment by the proposed assignee is not within the scope of the use originally intended by this Lease.



Without limiting the foregoing, Lessor must be satisfied with the proposed assignee's business experience and reputation, personnel qualifications, management ability, financial status and corporate/partnership status (such as place of incorporation or registration, etc.). Lessor may require an investigation of the financial condition, business reputation, credit standing, performance history, quality of business operation and other relevant aspects of Lessee's proposed assignee to be conducted to enable Lessor to make an informed decision on whether Lessor should consent to the assignment. All reasonable costs of such an investigation shall be paid for by Lessee.

No assignment or transfer shall in any way release Lessee or any guarantor of this Lease from their obligations under this Lease or any guaranty. Lessee and any guarantor shall remain primarily liable to Lessor for the payment of rent and the performance of all other obligations due under this Lease or any guaranty, notwithstanding any such assignment or transfer, unless and except Lessor consents in writing to release same.

Any assignment or transfer of this Lease by Lessee without the prior written consent of Lessor shall constitute a default under this Lease, in which case, in addition to and not in limitation of all of Lessor's rights and remedies under this Lease available to Lessor in the event of a default, Lessor may demand and collect rent payments from the purported assignee or transferee without waiving its right to enforce this Lease against Lessee, and such collection of rent by Lessor shall not be deemed a waiver of any rights of Lessor as against Lessee under this Lease or any guaranty.

23. **ASSIGNMENT BY LESSOR.** Lessor may assign, transfer, pledge, hypothecate, or grant a security interest in this Lease or the equipment, in whole or in part, without the prior consent of Lessee, and Lessor's assignee or secured party may reassign said interest without the prior consent of Lessee; provided, however, that prior to any such assignment hereunder, Lessor (or any successor-in-interest to Lessor under this Lease, as the case may be), shall deliver written notice thereof to Lessee. Should this Lease or the equipment or any interest or part therein be so transferred, Lessee agrees:

- (a) That no such transfer shall give Lessee the right to demand assurances of performance;
- (b) That no breach or default by Lessor hereunder shall excuse performance by Lessee of any provision hereof, and no transferee shall be obligated to perform any covenant, condition or obligation required to be performed by Lessor hereunder;
- (c) That it will not assert against the transferee any claim, counterclaim or defense which it may now have or may hereinafter acquire against Lessor; and
- (d) That in the case of the foreclosure of any mortgage or security interest in the equipment, the transferee shall have the right to ratify and affirm the continuance of this Lease, and in such event Lessee shall continue to perform its obligations hereunder.

24. **DEFAULT.** Time is of the essence of this Lease. If Lessee fails to pay when due rent or any other amount required herein to be paid by Lessee and Lessee shall fail to cure the same within ten (10) days of the applicable due date, or if Lessee fails to perform any other provision hereof on its part to be performed within thirty (30) days of Lessor's written notice to Lessee describing such default, or if a longer period of time is reasonably necessary to cure such default then up to any additional ninety (90) days, so long as Lessee continuously prosecutes the same to completion within such 30-day period and throughout such 90-day period, or if Lessee or any guarantor of the Lease shall breach any representation or warranty made by Lessee or any such guarantor, respectively, Lessee shall be deemed to have committed a total breach and default of this Lease. In that event, or if Lessee fails generally to pay its debts as they become due, or if any proceeding under the Bankruptcy Code is commenced by or against Lessee, or if a receiver is appointed to take possession of any item of equipment, or if Lessee makes any assignment for the benefit of creditors, or if similar proceedings are instituted by or against Lessee, or if Lessee shall die or become incompetent or insolvent, or if Lessee shall cease doing the type of business for which the equipment was intended to be used, or if the equipment is confiscated, attached, seized, or threatened with confiscation, attachment or seizure, or if there shall be, in Lessor's sole discretion, any material adverse change in the condition of Lessee or any guarantor of this Lease, or if Lessee shall fail to comply with the insurance requirements under this Lease, or if such insurance is canceled or the coverage reduced prior to the termination of this Lease, or if the Lessee shall create any unauthorized lien or encumbrance on the Equipment which shall adversely affect the Lessor's rights under this Lease and in the Equipment, or if Lessee shall engage in any act or activity that, in Lessor's exclusive judgment, shall in any way prejudice or render insecure the Lessor's rights in the Equipment, or if Lessee shall be in default under any other lease between Lessor and Lessee, or if Lessee shall be in default under any loan, lease, credit facility, extension of credit, agreement or obligation with Lessor, or any subsidiary, affiliate, parent or successor of Bank of Hawaii, all of which shall also constitute a default under this Lease, then Lessor may terminate this Lease and/or with or without terminating this Lease and at its election:

- (a) Recover from the Lessee the sum of (i) all amounts then currently due under the Lease and all remaining rental payments due under the Lease during the fiscal year in effect when the default occurs and (ii) interest and late charges due thereon;
- (b) Enter upon Lessee's premises and take possession of the equipment. Lessee waives any damages occasioned by such taking of possession whether or not Lessee was in default at the time possession was taken, so long as Lessor reasonably believed at the time that Lessee was in default at said time;
- (c) Lease the equipment to any other person or persons at such rental and upon such terms and conditions as Lessor shall determine, including the right to lease such equipment beyond the expiration of the term of this Lease;



(d) Sell or otherwise dispose of the Equipment in such commercially reasonable manner as the Lessor shall determine, and if Lessor so disposes of any Equipment, then Lessor shall apply the entire proceeds of such disposition as follows: first, to pay costs that Lessor has incurred in connection with exercising its remedies; second, to payment of amounts that are payable by Lessee under clause (a) above; and then to payment of the Stipulated Loss Value set forth in the applicable Schedule for the last Rent Payment due date for the fiscal year in which the related default occurs; provided, however, that any disposition proceeds in excess of payment of all of the foregoing amounts shall be paid promptly by Lessor to Lessee;

(e) Pursue any applicable remedies provided under the Hawaii Uniform Commercial Code or applicable law; or

(f) Bring an action for damages to pursue any other remedy at law or equity which Lessor may have.

No right or remedy herein conferred upon or reserved by Lessor is exclusive, and each remedy is cumulative and may be enforced separately or concurrently from time to time. Lessor's acceptance of rent or other performance shall not be deemed a waiver of any of its remedies in the event of Lessee's default. The proceeds of any rental or sale of the equipment, minus all reasonable costs and expenses incurred in the recovery, repair, storage, renting or sale, shall be applied to the payment of Lessee's obligations hereunder. Lessee shall remain liable for any deficiency. Regardless of the remedy or remedies pursued by Lessor, Lessee agrees to be liable for, and, upon demand, to pay to Lessor, in addition to all other sums due hereunder, the full amount of all reasonable costs or expenses, including reasonable attorney's fees, incurred by Lessor in connection with any action by Lessor hereunder. Lessee shall not assert against Lessor or Lessor's assignee, any claim or defense arising from any breach of warranty by any vendor, supplier or manufacturer, or from any equipment defect, and Lessee waives any claims against Lessor for loss of profits, damages, costs or other expenses arising therefrom. In the event of Lessee's bankruptcy, there shall be no extension of the 60-day time period under the Bankruptcy Code within which this Lease must be accepted or rejected and, if not accepted, this Lease shall immediately terminate. Notwithstanding anything to the contrary contained herein, any failure by the Council to appropriate Available Funds for payments hereunder shall not constitute a default of this Lease.

**25. PERFORMANCE BY LESSOR; ADVANCEMENT OF FUNDS.** In addition to any other remedies provided herein, if Lessee fails to observe or perform any agreement, condition or obligation of this Lease, including, without limitation, Lessee's obligations to provide insurance, to register and license the equipment and to keep the equipment free of liens and encumbrances, or if any suit, proceeding or other contingency shall arise or be threatened which may in the opinion of Lessor threaten the equipment or Lessor's interest therein, Lessor may, without notice or demand, perform any obligation of Lessee and make any advances or incur such expenses, costs or attorneys' fees as Lessor in its judgment deems advisable to protect the equipment or Lessor's interest therein or to carry out Lessee's obligations hereunder. All such advances, costs, expenses and attorney's fees shall be paid by Lessee to Lessor upon demand and shall bear interest from the date incurred until paid at the rate of twelve percent (12%) per annum.

**26. LESSOR'S RIGHT OF SET-OFF; SECURITY INTEREST IN ACCOUNTS.** If Lessee shall be in default under this Lease, Lessor may set-off any funds of Lessee held in accounts maintained with Lessor or any subsidiaries or affiliates of Lessor (such as checking and savings accounts) against any sums owed by Lessee to Lessor under this Lease, and Lessor may do so without having to resort to any other collateral which may have been given to secure this Lease. To secure Lessee's obligations under this Lease, Lessee hereby grants to Lessor a security interest in all checking, savings and other deposit accounts now or hereafter maintained by Lessee with Lessor or any subsidiaries or affiliates of Lessor.

**27. APPLICABLE LAW.** The validity, enforcement and performance of this Lease shall be governed and determined by the laws of the State of Hawai'i.

**28. TERMINATION, MODIFICATION AND WAIVER.** This Lease cannot be terminated or cancelled except as expressly provided herein. No amendment, alteration, change to or waiver of any provision of this Lease shall be effective unless the same shall be in writing and signed by Lessor and Lessee. Failure by Lessor to exercise any remedy which Lessor may have hereunder or any other acquiescence in the default of Lessee shall not constitute a waiver of any obligation of Lessee including the obligation in which Lessee is in default, and Lessor shall be entitled to pursue any remedy available to it hereunder until Lessee has rendered complete performance of all obligations of this Lease.

**29. ACCIDENTS.** Lessee agrees to immediately notify Lessor, and within three (3) days thereafter, confirm such notification in writing, of any loss of or damage to, or of any accident connected with, the use or operation of any of the equipment, giving such information as may be pertinent to Lessor's investigation of the occurrence as Lessor may reasonably require.

**30. REPORTS AND DOCUMENTS.** Lessee shall submit to Lessor within two hundred forty (240) days of the close of its fiscal year and at Lessee's sole cost and expense: (a) Lessee's annual financial statement (audited by an independent certified public accountant) including income and expense data, (b) a comprehensive annual financial report of Lessee, and (c) an annual fiscal budget of Lessee. In addition, Lessee shall submit to Lessor such corporate resolutions, opinions of counsel, financial statements, tax returns and other documents related to this Lease, its tax treatment or the equipment as Lessor may reasonably request from time to time. Lessee shall execute such documents as Lessor shall require to effectuate the transfer or recording of its interest in this Lease or the equipment, in whole or in part, as may otherwise be necessary to protect, license, register, or evidence Lessor's ownership or interest thereof.

**31. NOTICES.** All notices required or permitted under this Lease shall be sufficient if delivered personally or mailed to the party at its principal place of business, or at such other address as either party may designate in writing from time to time. Any such notice mailed to such address shall be effective seventy-two (72) hours after it has been deposited in the United States mail, duly addressed and postage prepaid.



32. **ENTIRE AGREEMENT.** This Lease, its Exhibits and any Certificates executed pursuant hereto constitute the entire understanding or agreement between Lessor and Lessee. There is no understanding or agreement, oral or otherwise, which is not set forth herein.

33. **BINDING EFFECT.** Subject to the provisions of paragraph 23, this Lease inures to the benefit of and is binding upon the respective heirs, devisees, personal representatives, successors and assigns of the parties. If this Lease is signed by more than one person, firm and/or corporation as Lessee, all of the covenants and obligations contained in the Lease and on the part of Lessee to be performed shall be considered the joint and several covenants and obligations of each signer of the Lease.

34. **SEVERABILITY.** If any provision of this Lease is held invalid or illegal, such invalidity or illegality shall not affect any other provisions which can be given effect without the invalid or illegal provisions. The provisions of this Lease are severable and this Lease and any provision hereof shall be enforceable to the extent and only to the extent it is valid and legal.

35. **HEADINGS.** Paragraph headings contained herein shall not govern, limit, modify, or affect the scope, meaning or intent of the provisions of this Lease.

36. **SURVIVAL OF COVENANTS.** Wherever the context permits, Lessee's covenants under this Lease shall survive the delivery and return of the equipment leased hereunder.

37. **NATURE OF TRANSACTION.** It is the intent of the parties hereto that this be a conditional sale of the equipment leased hereby and all terms of this Lease shall be construed as to give effect to that intention.

38. **ADMINISTRATION FEES.** If Lessee requests changes or modifications to this Lease or requests any other action by Lessor related to this Lease, or if Lessee, by its actions or inaction causes Lessor to take action under this Lease, Lessor shall have the right to collect from Lessee reasonable fees for having to take such action, including by way of example only and without limitation, fees for processing any amendments or modifications of this Lease, and any consents related to this Lease. Such fees shall be based, when applicable, on Lessor's rates as set from time to time by Lessor and shall include all costs and expenses, including reasonable attorneys' fees, incurred by Lessor in having to take such action.

39. **JURY TRIAL WAIVER.** Lessor and Lessee hereby waive trial by jury in any action, proceeding, claim, or counterclaim, whether in contract or tort, at law or in equity, arising out of or in any way related to this Lease or any documents executed in connection with this Lease.

40. **COUNTERPARTS.** The parties hereto agree that this instrument may be executed in counterparts, each of which shall be deemed an original, and said counterparts shall together constitute one and the same agreement, binding all of the parties hereto, notwithstanding all of the parties are not signatories to the original or the same counterpart. For all purposes, including, without limitation, recordation, filing and delivery of this instrument, duplicate unexecuted and unacknowledged pages of the counterparts may be discarded and the remaining pages assembled as one document.

41. **ELECTRONIC SIGNATURES.** The parties hereto agree that delivery of a signature page to, or an executed counterpart of, this Agreement by facsimile, email transmission of a scanned image or other electronic means, shall be effective as delivery of an originally executed signature page or counterpart, and shall be of the same legal effect, validity or enforceability as a manually executed signature or the use of a paper-based record keeping system, as the case may be, to the extent and as provided for in any applicable law. Alternatively, you agree to adopt your electronic signature below as your signature and you are creating a valid, binding contract under the Federal Electronic Signatures in Global and National Commerce Act, the Hawai'i Uniform Electronic Transactions Act and/or the Hawai'i Uniform Commercial Code. You further acknowledge and agree that upon request you will deliver an original, fully executed copy of this document to Bank of Hawaii.

42. **OTHER TERMS AND CONDITIONS.**

- a) Lessor shall be named as legal owner and lien holder and Lessee shall be named as registered owner of all vehicles covered by this Lease. All such vehicles shall be maintained as recommended by the applicable owner's manual and all maintenance shall be documented and maintained in the respective vehicle.
- b) The Lessor and Lessee intend that the transaction evidenced hereby is a lease of the equipment. To protect the interest of the Lessor in the event that any court should make a contrary determination, the Lessee authorizes the Lessor to file one or more financing statements describing the equipment and any other statutory liens held by the Lessor.
- c) The terms and conditions of the following addenda attached hereto are hereby incorporated by reference:

Addendum B – Modification of Insurance Requirements  
Advance Funding Addendum



*[The remainder of this page is intentionally left blank; signature page follows.]*




IN WITNESS WHEREOF, the parties hereto have executed this Lease on this 30th day of September, 2022.

LESSOR

BANK OF HAWAII

By   
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

By   
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

LESSEE

COUNTY OF MAUI

By   
Name: MAY-ANNE A. ALBIN  
Its: DEPUTY DIRECTOR OF FINANCE

By \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

APPROVED AS TO FORM AND LEGALITY

By   
Deputy Corporation Counsel  
County of Maui