§ 3628. Erie County Medical Center Corporation. 1. (a) There is hereby created a state board to be known as the Erie County Medical Center Corporation, which shall be a body corporate and politic constituting a public benefit corporation.

(b) The corporation shall be governed by fifteen voting directors, of whom eight directors shall be appointed by the governor and seven directors shall be appointed by the county executive of the county of Erie. The governor shall make appointments to the corporation as follows: three directors from a recommendation submitted by the county executive of the county of Erie; three directors from a recommendation submitted by the legislature of the county of Erie; one director, who shall be a resident of the county of Erie, from a recommendation submitted by the temporary president of the senate; and one director, who shall be a resident of the county of Erie, from a recommendation submitted by the speaker of the assembly. The county executive of the county of Erie shall make seven appointments to the board with the advice and consent of the legislature of the county of Erie.

The terms of the initial directors appointed by the governor shall be five years for such directors appointed upon recommendation of the temporary president of the senate and the speaker of the assembly. The terms of the initial directors appointed by the governor upon the recommendation of the county executive of the county of Erie shall be five years for one, four years for one, and three years for one. The terms of the initial directors appointed by the governor upon the recommendation of the legislature of the county of Erie shall be four years for two and three years for one. The terms of the initial directors appointed by the county executive of the county of Erie shall be one year for two of such directors, two years for three of such directors, and three years for two of such directors.

(c) Each director shall possess a high degree of experience and knowledge in relevant fields and a high degree of interest in the corporation. The appointment of any director to the corporation shall be based in part on the objective of ensuring that the corporation includes diverse and beneficial perspectives and experience, including, but not limited to, those of business management, law, finance, medical or other health professionals or both, health sector workers, the patient or

consumer perspective, and residence in the western New York community.

2. There shall be four non-voting representatives, who shall include the chief executive officer of the corporation appointed by the voting directors of the board, one selected by the Erie county executive, one selected by the majority leader of the Erie county legislature, and one member selected by the minority leader of the Erie county legislature. Such representatives shall have all of the rights and powers of the directors other than the right and power to vote, including, but not limited to, the right to equal access to information.

3. All directors and non-voting representatives shall continue to hold office until their successors are appointed and qualify. All subsequent appointments made upon the expiration of an initial term shall be for a term of five years, and all appointees shall be eligible for reappointment. Vacancies occurring otherwise than by expiration of term of office shall be filled for the unexpired terms in the manner provided for original appointment. Members of the board may be removed from office by the board for inefficiency, neglect of duty, or misconduct in office after the board has given such member a copy of the charges against him or her and an opportunity to be heard in person or by counsel in his or her defense, upon not less than ten days notice.

4. (a) The directors shall, by majority vote, select one of the fifteen directors as the chairperson of the board. The chairperson shall preside over all meetings of the board and shall have such other duties as the directors may provide.

(b) The voting directors and non-voting representatives of the corporation shall receive no compensation for their services, but shall be reimbursed for all their actual and necessary expenses incurred in connection with carrying out the purposes of this title.

(c) The powers of the corporation shall be vested in and shall be exercised by the board at a meeting duly called and held, where a quorum of eight directors is present. No action shall be taken by the corporation except pursuant to the favorable vote of at least eight directors present at the meeting at which such action is taken.

(d) The members of the board or any committee thereof may participate

in a meeting of such board or committee by means of a conference telephone or similar communications equipment allowing all persons participating in the meeting to hear each other at the same time; participation by such means shall constitute presence in person at a meeting.

(e) Any action required or permitted to be taken by the board or any committee thereof may be taken without a meeting if all members of the board or the committee consent in writing to the adoption of a resolution authorizing the action. The resolution and the written consents thereto by the members of the board or committee shall be filed with the minutes of the proceedings of the board or committee.

5. The voting directors shall select and shall determine the salary and benefits of the chief executive officer of the corporation. The directors shall have the authority to discharge the chief executive officer with or without cause; provided, however, that removal without cause shall not prejudice the contract rights, if any, of the chief executive officer.

6. Notwithstanding any inconsistent provision of any general, special, or local law, ordinance, resolution, or charter, no officer, member, or employee of the state or of any public corporation shall forfeit his or her office or employment by reason of his or her acceptance of appointment as a director, non-voting representative, officer, or employee of the corporation, nor shall service as such a director, non-voting representative, officer, or employee be deemed incompatible or in conflict with such office or employment; and provided further, however, that no public officer elected to his or her office pursuant to the laws of the state or any municipality thereof may serve as a member of the governing body of the corporation during his or her term of office.

7. The corporation shall have a chief executive officer, a secretary, a treasurer, and such other officers as the board shall from time to time provide; such officers shall exercise the duties provided by the board or by this title.

8. The corporation and its corporate existence shall continue until terminated by law; provided, however, that no such termination shall take effect so long as the corporation shall have bonds or other obligations outstanding, unless adequate provision has been made for the payment or satisfaction thereof. Upon termination of the existence of the corporation, all of the rights and properties of the corporation then remaining shall pass to and vest in the county in such manner as is or may be prescribed by law.

9. Contracts for works, construction, or purchases to which the corporation is a party shall be subject to the provisions of article five-A of the general municipal law, except as provided in subdivisions ten and eleven of this section. In addition to the procedures prescribed under section one hundred four of the general municipal law for the utilization of the terms of state contracts, the corporation may utilize the terms of a federal government general services contract where the terms are to the advantage of the corporation and have been offered to the corporation by the contractor. When bids have already been received by the corporation, no purchase under a federal government general services contract shall be made, unless the purchase may be made upon the same terms, conditions, and specifications at a lower price through such contractor.

10. It is the intent of the legislature that overall cost shall in all cases be a major criterion in the selection of project developers for award of contracts pursuant to this section and that, whenever practical, such contracts shall be entered into through competitive bidding procedures, as prescribed by sections one hundred one and one hundred three of the general municipal law. It is further the intent of the legislature to acknowledge the highly complex and innovative nature of medical technology and diagnostic and treatment devices, the relative newness of a variety of devices, processes, and procedures now available, the desirability of a single point of responsibility for the development of medical treatment and diagnostic facilities, and the economic and technical utility of contracts for medical projects which include in their scope various combinations of design, construction, operation, management, or maintenance responsibility, or any combination

thereof, over prolonged periods of time, and to acknowledge that, in some instances, it may be beneficial to the corporation to award a contract for a medical project on the basis of factors other than cost alone, including, but not limited to, facility design, system reliability, efficiency, safety, and compatibility with other elements of patient care. Accordingly, and notwithstanding the provisions of any general, special, or local law or charter, a contract for a medical project entered into between the corporation and any project developer pursuant to this section may be awarded pursuant to public bidding in compliance with sections one hundred one and one hundred three of the general municipal law or pursuant to the following provisions for the award of a contract based on an evaluation of proposals submitted in response to a request for proposals prepared by or for the corporation:

(a) The corporation shall require that each proposal to be submitted by a project developer include:

(i) information relating to the experience and expertise of the project developer on the basis of which said project developer purports to be qualified to carry out all work required by a proposed contract; the ability of the project developer to secure adequate financing; and proposals for project staffing, implementation of work tasks, and the carrying out of all responsibilities required by a proposed contract;

(ii) a proposal clearly identifying and specifying all elements of costs which would become charges to the corporation, in whatever form, in return for the fulfillment by the project developer for the full lifetime of a proposed contract, including, as appropriate, but not limited to, the cost of planning, design, construction, operation, management, or maintenance, or any combination thereof, of any facility, and clearly identifying and specifying all elements of revenue which would accrue to the corporation from the operation of the facility or device or from any other source; provided that the corporation may prescribe the form and content of such proposal and that, in any event, the project developer must submit sufficiently detailed information to permit a fair and equitable evaluation by the corporation of such proposal; and provided, further, that the corporation may set maximum allowable cost limits in any form in the request for proposals; and

(iii) such other information as the corporation may determine to have a material bearing on its ability to evaluate any proposal in accordance

with this paragraph;

(b) Prior to the issuance of a request for proposals pursuant to this subdivision, the corporation shall publish notice of such issuance in at least one newspaper of general circulation. Concurrent with the publication of such notice, a draft request for proposals shall be filed with the county commissioner of health;

(c) Proposals received in response to such request for proposals shall be evaluated by the corporation as to net cost or, if a net revenue is projected, net revenue, and in a manner consistent with provisions set forth in the request for proposals, and may be evaluated on the basis of additional factors, including, but not limited to, the technical evaluation of the medical project, including medical facility, facility design, system reliability, energy balance, and efficiency. The evaluation of such proposals and the determination of whether or not a project developer is "responsible" may include, but shall not be limited to, consideration, in a manner consistent with provisions set forth in the request for proposals, of the record of the project developer in complying with existing labor standards and recognizing state and federally approved apprentice training programs and consideration of the willingness of the project developer to provide for meaningful participation of minority group persons and business enterprises in the conduct of the work; and

(d) The corporation may make a contract award to any responsible project developer based on a determination by the corporation that the selected proposal is most responsive to the request for proposals and may negotiate with any project developer; provided, however, that, if any award is made to any project developer whose total proposal does not provide either the lowest net cost, or, if a net revenue is projected, the greatest net revenue, of any proposal received, the corporation shall adopt a resolution which includes particularized findings relevant to factors pursuant to paragraph (c) of this subdivision indicating that the corporation's requirements are met by award and that such action is in the public interest.

Whenever the corporation enters into a contract pursuant to this section for a medical project which involves construction, the provisions of section two hundred twenty of the labor law shall be

applicable to such construction work.

11. Every contract entered into between the corporation and a project developer, pursuant to the provisions of paragraph (d) of subdivision ten of this section, for a medical project involving construction of a medical building by the project developer, shall contain provisions that such building shall be constructed through construction contracts awarded through competitive bidding in accordance with paragraphs (a) through (g) of this subdivision; that the project developer or the project developer's construction subcontractor shall furnish a bond guaranteeing prompt payment of moneys that are due to all persons furnishing labor and materials pursuant to the requirements of such construction contracts, and that a copy of such payment bond shall be kept by the corporation and shall be open to public inspection; provided, however, that the requirements of this subdivision shall not apply when the cost of such construction, exclusive of the cost of medical equipment, apparatus, and devices, is less than five hundred thousand dollars.

(a) The project developer shall advertise for bids for such construction contracts in a daily newspaper having general circulation in the county. Such advertisement shall contain a statement of the time and place where all bids received pursuant to such notice will be publicly opened and read. An employee of the corporation shall be designated to open the bids at the time and place specified in the notice. All bids received shall be publicly opened and read at the time and place so specified. At least five days shall elapse between the publication of such advertisement and the date on which the bids are opened.

(b) Except as otherwise provided in section two hundred twenty-two of the labor law, when the entire cost of constructing such building, exclusive of any medical equipment, apparatus, or devices, exceeds five hundred thousand dollars, the project developer shall prepare separate specifications for the following subdivisions of such work, so as to permit separate and independent bidding upon each subdivision:

(i) plumbing and gas fittings;

(ii) steam heating, hot water heating, ventilating, and air conditioning apparatus; and

(iii) electric wiring and standard illuminating fixtures.

(c) After public competitive bidding, the project developer shall award one or more separate contracts for each of the above subdivisions of such work, whenever separate specifications are required pursuant to paragraph (b) of this subdivision, and one or more contracts for the remainder of such work. The project developer may award such contracts at different times. Contracts awarded pursuant to this subdivision shall be awarded by the project developer to the lowest responsible and responsive bidder and shall be contracts of the project developer and not of the corporation, which shall have no obligation or liabilities, whatsoever, thereunder. The project developer shall have the responsibility for the supervision, coordination, and termination of such contracts, unless otherwise specified in contractual terms between the project developer and the corporation.

(c-1) Each bidder on a public work contract, where the preparation of separate specifications is not required, shall submit with its bid a separate sealed list that names each subcontractor that the bidder will use to perform work on the contract, and the agreed-upon amount to be paid to each, for: (i) plumbing and gas fitting, (ii) steam heating, hot water heating, ventilating and air conditioning apparatus and (iii) electric wiring and standard illuminating fixtures. After the low bid is announced, the sealed list of subcontractors submitted with such low bid shall be opened and the names of such subcontractors shall be announced, and thereafter any change of subcontractor or agreed-upon amount to be paid to each shall require the approval of the public owner, upon a showing presented to the public owner of legitimate construction need for such change, which shall be open to public inspection. Legitimate construction need shall include, but not be limited to, a change in project specifications, a change in construction material costs, a change to subcontractor status as determined pursuant to paragraph (e) of subdivision two of section two hundred twenty-two of the labor law, or the subcontractor has become otherwise unwilling, unable or unavailable to perform the subcontract. The sealed lists of subcontractors submitted by all other bidders shall be returned to them unopened after the contract award.

(d) In determining whether or not a prospective contractor is responsible and responsive, the project developer may require that

prospective contractors:

(i) have adequate financial resources or the ability to obtain such resources;

(ii) be able to comply with the required or proposed delivery or performance schedule;

(iii) have a satisfactory record of performance;

(iv) have the necessary organization, experience, operational controls, and technical skills, or the ability to obtain them;

(v) have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and

(vi) be eligible to receive an award under applicable laws and regulations and be otherwise qualified.

(e) The project developer may reject any bid of a bidder if the project developer determines the bidder to be non-responsible or the bid non-responsive to the advertisement for bids.

(f) The project developer may, in its discretion, reject all bids, may revise bid specifications, and may re-advertise for bids as provided in this subdivision for original advertisements.

(g) Only as used in this section:

(i) "project developer" means any private corporation, partnership, limited liability company, or individual, or combination thereof which has submitted a proposal in response to a request for proposals;

(ii) "construction" includes reconstruction, rehabilitation, or improvement, exclusive of the installation and assembly of any medical equipment, apparatus, or device;

(iii) "medical building" means that component of a medical project constituting appurtenant structures or facilities necessary to house or render the remaining components of the medical project operational. Medical building does not include apparatus, equipment, devices, systems, supplies, or any combination thereof; and

(iv) "medical project" means any substantial durable apparatus, equipment, device, or system, or any combination of the foregoing, including services necessary to install, erect, or assemble the foregoing, and any appurtenant structures or facilities necessary to house or render the foregoing operational, to be used for the purpose of care, treatment, or diagnosis of disease or injury or the relief of pain and suffering of sick or injured persons. Medical projects do not

include ordinary supplies and equipment expended or utilized in the customary care and treatment of patients.

12. (a) For purposes of applying section eighty-seven of the public officers law to the corporation, the term "trade secrets" shall include marketing strategy or strategic marketing plans, analyses, evaluations, and pricing strategies or pricing commitments of the corporation relating to business development, including strategic alliances and contracts for managed care and other network arrangements, capitation contracts, and other similar arrangements relating to business development which, if disclosed, would be likely to injure the competitive position of the corporation.

(b) In addition to the matters listed in section one hundred five of the public officers law, the corporation may conduct an executive session for the purpose of considering marketing strategy or strategic marketing plans, analyses, evaluations, and pricing strategies or pricing commitments of the corporation relating to business development, including strategic alliances and contracts for managed care and other network arrangements, capitation contracts, and other similar arrangements relating to business development which, if disclosed, would be likely to injure the competitive position of the corporation.

13. The county shall provide the corporation with full funding of the network's existing capital program for the years two thousand four, two thousand five, and two thousand six, as authorized in the county's two thousand three capital budget.