To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

In the Matter of the Application of
Xavier Contracting, LLC,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules — DECISION/ORDER/ JUDGMENT

-against-

Index No. 20397/05

The Rye City School District,

Respondent.

----------X

LIPPMAN, J.

The following papers numbered 1 to 44 were read on the petition pursuant to CPLR Article 78:

PAPERS	NUMBERED
Notice of Petition/Verified Petition/Exhibits A-N	1 - 16
Acocella Affidavit	17 - 18
Petitioner's Memorandum of Law	19
Answer/Shine Affidavit/Exhibits A-P	20 - 37
DiGaetano Affidavit/Exhibit A-B	38 - 40
Respondent's Memorandum of Law in Opposition	41
Petitioner's Reply Memorandum of Law	42
Petitioner's Reply Affidavit/Exhibit 2	43 - 44

Upon the foregoing papers, it is ordered and adjudged that the petition is dismissed.

FACTUAL BACKGROUND

On or about April 8, 2005, respondent, The Rye City School District, advertised for bids for a construction project (State Project No.66-18-00-01-0-002-011) relating to additions and alterations to the Milton Elementary School in Rye, New York (the "project"). The advertisement for bids stated that the project involved work divided into nine bid packages to be let as separate trade contracts. The bid documents described the scope of the work involved in each bid package. Pursuant to the advertisement, respondent required all bid proposals to be accompanied by a certified check payable to respondent or by a bid bond for a sum equal to 5% of the bid amount, "conditioned as set forth in the Instructions to Bidders." Section 10.6 of the Instructions to Bidders provided that acceptance of a proposal would be in a notice in writing signed by a duly authorized representative of the owner. Section 11.2 of the Instructions to Bidders stated that "failure of the successful bidder to execute a Trade Contract within 10 days of the award may, at the Owner's option, result in a forfeiture of the certified check or the bid bond, as the case may be, to the Owner's account as liquidated damages."

On May 12, 2005, petitioner, Xavier Contracting LLC, submitted a bid for Bid Package 4, the General Trades portion of the project, in the amount of $3,528,000, together with a bid bond in the amount of $176,400. On May 19, 2005, petitioner submitted to Andron Construction Corp. ("Andron"), the construction manager for the project, a schedule of values setting forth the value of work items contained in its bid. On June 20, 2005, at a meeting of respondent's Board of Education (the "Board"), the Board passed a resolution approving petitioner's bid.

Pursuant to the affidavit of Andron's pre-construction project manager, Louis S. DiGaetano, on June 2 and 10, 2005, petitioner's principal, Frank X Acocella, met with Mr. DiGaetano as well as respondent's representatives and architect on June 2 and 10, 2005.

On or about June 3, 2005, petitioner submitted its 2004 income statement, resumes of its

project manager and site superintendent, union affiliation letter and Certificate of Insurance policy to Andron in support of its bid. In a cover letter dated June 3, 2005 which accompanied this additional documentation, Mr. Acocella stated that "Xavier Contracting , LLC ("LLC") is ready willing and able to perform this project in a workmanlike manner-in accordance with the terms of the contract and with the utmost quality and in a timely fashion."

By letter dated June 21, 2005 and entitled, "Letter of Intent-General Trades Additions and Renovations to Milton Elementary School," Edward Shine, respondent's Superintendent of Schools, notified petitioner that the Board had "awarded Bid Package 4 for General Trades at the above-referenced project to Xavier Contracting, LLC for a base bid in the amount of $3,528,000.00." Mr. Shine also advised petitioner in the June 21, 2005 letter as follows: "Please let this letter act as authorization to order your needed materials. Andron Construction will be preparing the formal contract referencing the bid specifications and Andron's representatives will be in touch with you." Petitioner asserts in its petition that it received this June 21, 2005 letter on June 28, 2005.

On June 21, 2005, Andron held a contractors meeting which Mr. Acocella attended. The minutes of the meeting contain a notation that "all contractors to follow up with 'post award' information. This includes submittal schedule, schedule of values, construction schedule and safety program." The minutes further indicated that "no work is to be performed out in the field until the contract, bond and insurance are approved by Andron. As per post award instructions there [sic] are to be sent to Cathy DiSiena at Andron's Goldens Bridge Office."

On or about June 23, 2005, Andron forwarded three originals of the contract to petitioner and a memorandum dated June 23, 2005. The memorandum advised petitioner to submit a performance and payment bond and insurance certificate "before the District can finalize the

award of your Trade Contract." The June 23, 2005 memorandum further stated that after Andron had examined the insurance certificate and bond, it would "recommend that the District sign the Trade Contract." Petitioner asserts that it received the contracts and the memorandum on June 29, 2005.

In its petition, petitioner alleges that sometime over the weekend of July 4, 2005, it discovered an error in its bid regarding specification Section 09250 entitled "Gypsum Board Assemblies." Petitioner asserts that as a result of a formula error on its worksheet and its transcription to the bid, three items of work were omitted from Section 09250. Consequently, petitioner alleges, while the sum of $58,000 was listed under this section, petitioner intended to list the total sum of $580,000 - a mistake which resulted in a $522,000 deviation from Xavier's worksheets.

By letter dated July 5, 2005 addressed to respondent, petitioner asserted that it had made an error in its bid and sought to withdraw its bid. It is unclear from the record when respondent received this letter. While the letter indicates that it was faxed on July 5, 2005 to respondent, on or about July 12, 2005, Mr. Shine wrote a letter to petitioner "in reply to your letter of July 5, 2005 which we received on July 7 from Andron Construction via facsimile." Mr. Shine's July 12, 2005 letter advised petitioner that it was respondent's position that petitioner was required to perform the contract in accordance with its bid documents and the bid award and warned petitioner that if it did not execute the contract and return it by July 14, 2005, the respondent would award the contract to the next lowest bidder.

At a meeting held on July 16, 2005, the Board approved a resolution declaring petitioner in default for failure to execute the contract, rejecting petitioner's request to withdraw the bid, and determining not to return the bid bond. The resolution specifically provided that "the bid

security shall be forfeited due to the failure of Xavier Contracting, LLC to timely execute the contract." Thereafter, respondent rebid the general trades portion of the project and awarded it to the lowest bidder in the sum of $3,993,000.

On or about November 15, 2005, petitioner commenced this proceeding seeking judgment directing respondent to "recognize that Petitioner's bid has been timely withdrawn" and to return the bid bond. On or about November 16, 2005, the respondent commenced an action in Supreme Court, Westchester County, against petitioner and the surety on the bid bond entitled, " The Rye City School District v. Xavier Contracting, LLC, and Fidelity and Deposit Company of Maryland," Index No. 20776/05. Petitioner has moved in that action for dismissal of the first and third causes of action. By stipulation of the parties, this proceeding and the return date of the motion to dismiss were both made returnable on January 24, 2006.

LEGAL DISCUSSION

Petitioner was entitled to withdraw its bid if no award of the contract was made within 45 days after respondent's receipt of the bid (*see* General Municipal Law §105). In support of its application, petitioner argues that no award of the contract was made within the 45 day period since the contract had not been fully executed. In particular, petitioner argues that the " cumulative effect of the requirements" in the Instructions to Bidders, the meeting held on June 21, 2005 and the June 23, 2005 transmittal letter from Andron, evidence that the award had not been finalized. Thus, petitioner argues, respondent's resolution denying petitioner's request to return the bid bond and permit petitioner to withdraw its bid was arbitrary, capricious and unreasonable.

Contrary to petitioner's contentions, respondent's resolution had a rational basis and was

supported by the record (*see Pell v Board of Education*, 34 NY2d 222[1974]). Respondent's position that the award was made within the statutory time period and that a contract arose from petitioner's submission of the bid and respondent's acceptance by a resolution at a meeting of its Board on June 20, 2005 was not arbitrary under the circumstances (*see Belmar Contracting Company, Inc. v The State of New York*, 233 NY 189 [1922]). Indeed, the record before this Court indicates that respondent did not intend to delay the project until the formal contract had been executed. In its notice dated June 21, 2005, respondent specifically authorized petitioner to order the necessary materials. The facts of this case are distinguishable from that in *Guy Pratt Inc. v North Hempstead*, 127 AD 2d 592 [1987] upon which petitioner relies. Here, there was no specific contract provision or provision in the bidding documents clearly evidencing respondent' s intention that it would not be bound until an executed copy of the contract was delivered to petitioner. The bid bond was security that bidders would execute the contract and respondent's assertion that it was contemplated that there would be an obligation to execute the contract upon acceptance cannot be viewed as unreasonable (*see Abner M. Harper Inc. v Newburgh*, 159 AD 695 [1913]).

Consequently, this Court finds that as a matter of law, respondent's resolution denying petitioner's request to return the bid bond and permit petitioner to withdraw its bid was not arbitrary, capricious and unreasonable but had a rational basis (*see DME Contracting, Inc. v State of New York*, 195 AD2d [1993]). This decision, however, does not address the merits of petitioner's equitable arguments of excusable mistake and recision, which are to be properly addressed in the context of the action commenced by respondent against petitioner and the surety on the bond. Wherefore it is

ORDERED and ADJUDGED that the petition is hereby dismissed.

Dated: White Plains, New York
March 27, 2006

/S/
HON. JONATHAN LIPPMAN, J.S.C.

To:

Goldberg & Connolly
Attorneys for Petitioner
66 North Village Avenue
Rockville Centre, New York 11510

Barry B. LePatner & Associates LLP
Attorneys for Respondent
600 Lexington Avenue, 21st Floor
New York, NY 10022