

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of ANNAPOLIS BUS CO., )  
INC., et al. )  
) Docket No. MSBCA 2053  
Under Anne Arundel County )  
Board of Education )  
Solicitation No. 98-78 for )  
Student Transportation Services )

April 10, 1998

Board of Contract Appeals Jurisdiction - The Board of Contract Appeals does not have jurisdiction over procurement of student bus service by the Anne Arundel County Board of Education.

APPEARANCES FOR APPELLANTS:

Joseph G. Billings, Esq.  
Landover, MD  
Jeffrey S. Marcalus, Esq.  
Hillman, Brown & Darrow, P.A.  
Annapolis, MD

APPEARANCES FOR RESPONDENT:

Valerie Cloutier  
William A. Kahn  
Assistant Attorneys General  
Baltimore, MD

B. Darren Burns, Esq.  
Annapolis, MD

MEMORANDUM OPINION BY CHAIRMAN HARRISON

This Board grants Respondent's Motion to Dismiss for lack of jurisdiction. The parties filed briefs on the issue of this Board's jurisdiction and argument of counsel was entertained thereon on March 31, 1998. This Board's rationale for granting the Motion to Dismiss follows.

Findings of Fact

1. On November 3, 1997, the County Board's<sup>1</sup> Purchasing Office issued Solicitation No. 98-78 to provide transportation services over several route groups for Anne Arundel County Public School students.

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<sup>1</sup> The Respondent, Anne Arundel County Board of Education, is referred to herein as County Board.

2. The Purchasing Office and the Division of Transportation of the County Board conducted pre-bid conferences on November 21, 1997 and December 2, 1997, and, in response to certain questions by prospective offerors, issued several amendments and clarifications prior to bid opening on February 3, 1998.
3. On February 2, 1998, eighteen individual bus contractors submitted a timely protest of the solicitation to the County Board's Purchasing Office raising numerous grounds and objections.
4. Following bid opening on February 3, 1998, the bids were reviewed and processed for recommendation for award. At its meeting on February 18, 1998, the County Board awarded contracts for three of the route groups to: Ryder Public Transportation Services (Group B) in the amount of \$2,134,113.75; R. E. Wilson & Sons, Inc. (Group C) in the amount of \$2,371,081.50; and Ryder Public Transportation Services (Group D) in the amount of \$2,101,893.75. The Board did not award a contract for Group A, as all bids were rejected.
5. The Purchasing Officer's decision on Appellant's protest was issued on February 27, 1998 and Appellants appealed such decision<sup>2</sup>. Preliminarily, this Board addresses the Respondent's Motion to Dismiss on jurisdictional grounds.

### Decision

Appellants assert that this Board has jurisdiction over their appeal because the contracts are governed by the State's General Procurement Law. Division II of the State Finance and Procurement Article, 1995 Replacement Volume and 1997 Supplement (sometimes referred to here-in as SF). Whether the General Procurement Law governs procurement by county boards of education is a matter of statutory interpretation, which turns on legislative intent. Board of County Commissioners of Garrett County v. Bell Atlantic-Maryland, Inc., 346 Md. 160, 169,(1997); Board of Education of Garrett County v. Lendo, 295 Md. 55, 62-63(1982).

Appellants assert that the county Boards are State agencies and this Board agrees that county Boards have been held to be State agencies for some purposes.<sup>3</sup> However, this Board concludes that the Anne Arundel County School Board is not a State agency, i.e. an entity that is in the Executive Branch of the State government at least for purposes of application of the General Procurement Law. Based on this Board's discernment of legislative intent we find that the Anne Arundel County School Board is not subject to the State's General Procurement Law. The General Assembly gave the county Boards (including the Anne Arundel County School Board) "procurement laws" of their own in Education Article §§ 4-205(d), 5-112, and 7-106.

Appellants argue that the failure of the Education Article to cover service contracts, since the instant bus contracts are service contracts, means that the procurements must be covered by the

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<sup>2</sup> The Purchasing Officer's decision was rendered after the Appellants noted their appeal with this Board on February 12, 1998. For all purposes, however, this Board will treat the Appellant's notice of appeal as being properly filed with this Board for purposes of issuance of this opinion on this Board's jurisdiction.

<sup>3</sup> See Board of Education of P.G. County v. Secretary of Personnel, 317 Md. 34(1989); State v. Board of Education of Montgomery County, 346 Md. 633(1997).

provisions of the General Procurement Law dealing with service contracts. This Board disagrees. We initially observe that Education Article (Educ. Art.) §§ 5-112 and 7-106 govern procurement by a county Board of buildings, improvements, supplies, equipment, and textbooks and other materials of instruction. Because these statutes do not mention procurement of services (with the exception of Baltimore City as determined by the State Board, § 4-310) such are excluded. However, we find that procurement of services is within the general discretionary authority of a county Board, as set forth in Educ. Art. § 4-101, over “[e]ducational matters that affect the counties.” See Mayor and City Council of Baltimore v. Weatherby, 52 Md. 442, 450-51(1879) (where no city ordinance governed the method of contracting, the formalities of contracting were within the control of the Board of School Commissioners); Jackson v. Norris, 173 Md. 579, 608 (1937) (in the absence of a contracting statute, a public body “may conduct such negotiations and make the contract to buy, with or without competitive bidding, and upon such terms as are authorized and believed by it to be in the public interest”). See also Board of Education of Carroll County v. Allender, 206 Md. 466, 475 (1955) (a matter not prescribed by contracting statute is within the judgment of the public body).

There are four statutes within the Education Article that mainly govern procurement by a county Board. The relevant portions are set out below:

- (a) Educ. Art. § 4-205(d)(1997 Supp.)

§ 4-205. Powers and duties of county superintendent.

*(a) In general.* - In addition to the other powers granted and duties imposed under this article, the county superintendent has the powers and duties set forth in this section.

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*(d) Approval of contracts.* - A contract made by a county Board is not valid without the written approval of the county superintendent.

- (b) Educ. Art. § 4-310 (1997 Supp.)

§ 4-310. Procurement of goods and services

*(a) Rules and regulations.* - Notwithstanding any provision of local law, the Board shall adopt rules and regulations governing the procurement of goods and services by the Baltimore City Public School System in accordance with § 5-112 of this article.

*(b) Business enterprise goals.* - The Board shall adopt the Minority Business Enterprise and Women Business Enterprise goals of Baltimore City relating to procurement.

- (c) Educ. Art. § 5-112 (1997 Supp.)

(a) *Exceptions.* - This section does not apply to:

(1) Contracts for the purchase of books and other materials of instruction as defined in the State Department of Education Financial Reporting Manual; and

(2) Emergency repairs.

(b) *Advertisement for bids.* - (1) If the cost of any school building, improvement, supplies, or equipment is more than \$15,000, the county Board, at least 2 weeks before bids are to be filed, shall advertise for bids in at least one newspaper of general circulation in the county.

(2) The county Board may name in the specifications and advertisement for bids the particular make, kind, or brand of article to be contracted for or purchased.

(c) *Award of contract.* - (1) A contract for school building, improvement, supplies, or other equipment shall be awarded to the lowest responsible bidder who conforms to specifications with consideration given to:

- (i) The quantities involved;
- (ii) The time required for delivery;
- (iii) The purpose for which required;
- (iv) The competency and responsibility of the bidder; and
- (v) The ability of the bidder to perform satisfactory service.

(2) The county Board may reject any and all bids and readvertise for other bids.

(d) *Minority business utilization program.* - (1) In this subsection, the term "minority business enterprise" has the meaning stated in § 14-301 of the State Finance and Procurement Article.

(2) In Montgomery County, by resolution and by implementing regulations, the Montgomery County Board of Education shall establish a minority business utilization program to facilitate the participation of responsible certified minority business enterprises in contracts awarded by the Montgomery County Board of Education in accordance with competitive bidding procedures.

(e) *Contract in violation of section.* - A contract entered into or purchase made in violation of this section is void.

(d) Educ. Art. § 7-106

§7-106. Textbooks, materials of instruction, and supplies.

(a) Selection and purchase of school materials. - On the recommendation of the county superintendent and subject to the provisions of this article, each county Board shall adopt procedures for the selection and purchase of the following necessary items, at the lowest price consistent with good quality, for use in the public school.

- (1) Textbooks;
- (2) Supplementary readers;
- (3) Materials of instruction;
- (4) Visual and auditory aids;
- (5) Stationery; and
- (6) School supplies.

For purposes of this decision concerning this Board's jurisdiction only, we find that the subject contracts worth more than six million dollars that have been awarded by the county Board (see Finding of Fact No. 4) are State contracts. However, the procurement statutes applicable to county Boards differ significantly from the State's General Procurement Law. An examination of some of the major material differences leads Respondent to argue, and this Board to conclude, that the General Assembly did not intend the General Procurement Law to apply to county Board procurements conducted pursuant to the procurement statutes applicable to county Boards as set forth in the Education Article.

Appellants on the other hand argue that the General Procurement Law applies to all county<sup>4</sup> public school procurement activity and that this Board has jurisdiction over all such activity, whether it be school construction, bus service or book purchases, because county Boards are not expressly exempted from the General Procurement Law. In Appellant's view the specific legislation in the Education Article that deals with county Board procurement and, as another example, legislation in the Education Article dealing with single county community college procurement (since such entities are not expressly exempted from the General Procurement Law), are to be viewed as local law by this Board. Such local law, Appellant's argument continues, is only to be applied by this Board when in conflict with the General Procurement Law; otherwise the General Procurement Law should be applied. To illustrate, Appellant argues this Board should apply legislation in the Education Article dealing with the Minority Business Enterprise Program for the Prince George's County Community College to the extent it may conflict with legislation regarding the Statewide Minority Business Enterprise Program as set forth in the General Procurement Law.

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4 Including Baltimore City.

This Board disagrees with Appellant's argument in this regard. In this Board's view, the absence in the General Procurement Law of a specific exemption for county Boards and single county community colleges<sup>5</sup> does not mean that the General Assembly intended that the General Procurement Law apply to such entities generally, with specific conflicting laws as may be set forth elsewhere in the Maryland statutes to be applied as necessary. In this Board's view the Education Article governs county Board procurements, not the General Procurement Law, notwithstanding the absence of a specific exemption of county Boards from the coverage of the General Procurement Law. Nor is our opinion changed by the fact that county Boards have been viewed by Courts as executive branch agencies at least for certain purposes.

We now focus on the specifics upon which we base our opinion that the General Assembly does not intend that county Board procurements be subject to the General Procurement Law, and this Board's jurisdiction thereunder to resolve a protest relating to the formation of a State contract.

We first observe that control of county Board procurement is, for the most part, preserved to the county Board. The county Board may issue its own rules and procedures, Educ. Art. §§ 4-310 and 7-106. The county Board awards a contract, Educ. Art. § 5-112(c), and the contract is subject to the written approval of the county superintendent, Educ. Art. § 4-205(d). The State Board of Education exercises administrative oversight over these functions. Educ. Art. § 4-108.

In contrast, under the General Procurement Law, administrative oversight is in the Board of Public Works. SF § 12-101, "where it has resided for at least fifty years. . .," Kennedy Temporaries v. Comptroller of Treasury, 57 Md. App. 22, 28(1984). The Board of Public Works (BPW) sets policy and adopts regulations to implement the Procurement Law, SF § 12-101(b), and, with the exception of State road, bridge and highway contracts it approves all State contracts unless it has delegated such approval authority to the statutorily designated primary procurement units. The primary procurement units are the Departments of Budget and Management, General Services, Transportation, and Public Safety and Correctional Services, as well as the University System of Maryland, Morgan State University, St. Mary's College and the State Treasurer. Under present BPW sponsored regulations the award of all competitively let contracts that exceed \$100,000 must be presented to the BPW for its approval.

Nothing in the Education Article, in particular the county Board procurement laws cited above, make the procurement actions of either a county Board or the county superintendent of schools subject to the authority of the BPW or of any primary procurement unit as is the case with procurements by units under the General Procurement Law.<sup>6</sup> Given that substantial amounts of State funds are involved in procurement by county Boards, it is not likely that absence of BPW control

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<sup>5</sup> Bicounty community colleges are exempted by the provisions of SF '11-101(x) which defines unit to exclude a bicounty agency.

<sup>6</sup> The Board of Public Works also approves the State's contribution to funding of public school construction contracts but these matters come to the Board of Public Works through the Interagency Committee for Public School Construction under Educ. Art. " 5-301, et seq., not under the General Procurement Law.

was an oversight. It is more reasonable to assume that the General Assembly believed that oversight by the State Board of Education would suffice.

We next observe that under Educ. Art. § 5-112, there is a single procurement method, competitive sealed bids, prescribed for contracting for school buildings, improvements, supplies, and equipment in excess of \$15,000, except that, in Baltimore City, services also must be obtained by sealed bids. Educ. Art. § 4-310. When using the sealed bid method under § 5-112, a county Board is required to advertise for bids, at least two weeks prior to bid opening, “in at least one newspaper of general circulation in the county.” Educ. Art. § 5-112(b)(1). Textbooks and materials of instruction may be produced by any method that yields “the lowest price consistent with good quality.” Educ. Art. § 7-106(a). There is no particular procurement method prescribed for purchases of \$15,000 or less, for services, or for emergency repairs.

In contrast, for State contracts, there are seven different prescribed methods of contracting, each to be used as designated in the General Procurement Law. Competitive sealed bids, SF § 13-103, generally is the preferred method, SF § 13-102(a), not the only method as under Educ. Art. § 5-112. However, State agencies may use competitive sealed proposals, non-competitive negotiation, sole source, emergency, expedited, and small purchase methods under appropriate circumstances. SF § 13-104 through 13-109. When competitive methods are employed, notice must be given in the Maryland Contract Weekly at least ten or 20 days prior to opening, depending upon the anticipated amount of the contract. SF § 13-103(c) and 13-104(c).

Different standards also apply to the use and content of contract specifications. A county Board may “name . . . the particular make, kind, or brand of article . . .” Educ. Art. § 5-112(b)(2). State agencies, on the other hand, must “draft specifications to encourage maximum practicable competition without modifying [their] requirements . . .” and may not favor a single source. SF § 13-205(a).

A county Board and a State agency are also subject to different selection standards. When sealed bidding is employed, a county Board must award to the lowest responsive, responsible bidder, however, “with consideration given to: (i)[t]he quantities involved; (ii) [t]he time required for delivery; (iii) [t]he purpose for which required; (iv) [t]he competency and responsibility of the bidder; and (v) [t]he ability of the bidder to perform satisfactory service.” Educ. Art. § 5-112(c). When sealed bidding is not employed, there is no statutory standard for selection. However, a State agency using competitive bidding may select only the lowest responsive, responsible bidder and may select the bid with the lowest evaluated bid price only if permitted by the solicitation. SF § 13-103(e). If selection by competitive sealed proposals is used, the State agency has no discretion to base its selection on criteria not contained in the solicitation. SF § 13-104(f).

Focusing on yet another salient difference, we observe that if a county Board contract violates Educ. Art. § 5-112, the contract is void. There is no statute applicable to a county Board that authorizes the county Board to affirm an otherwise invalid contract. In contrast, under the General Procurement Law, not all contracts that violate the General Procurement Law’s requirements are void. Such contracts, however, are made voidable under SF § 11-204(c) if, in the judgment of the Board of Public Works, certain statutory requirements are met. Thereafter, a unit

subject to the General Procurement Law may ratify or avoid the contract. Id.

There is no across-the-board minority business participation program prescribed for county Boards. Under Educ. Art. § 5-112(d), the county Board for Montgomery County is specifically authorized to establish its own program. Under Educ. Art. § 4-310(b) (1997 Supp.), the Board for Baltimore City is required to adopt the goals of the City's program but not necessarily any other aspect of that program.

Under Educ. Art. § 4-125, the county Board for Prince George's County is authorized to adopt its own minority participation program with features that include preferences, set-asides, and other incentives. Each county Board's construction contracts funded through the State's public school construction program are subject to the State's minority participation program. 63 Opinions of the Attorney General 558 (1978). However, there is no legislative authorization for applying the State's minority participation program to any other county Board contracts. Accordingly, the State's minority business participation program, as set forth in the General Procurement Law, does not apply to any procurement by a county Board (other than a school construction contract). It is unlikely that such a result, given the history of this State's commitment to assisting MBE's, was accidental. The General Assembly deliberately chose to have county Board procurements handled by the county boards subject to oversight by the State Board rather than have such procurements proceed under the General Procurement Law.

There are other areas of difference. For example, the General Procurement Law specifies mandatory clauses for contracts and implementing regulations are required to be published in COMAR. There are no comparable provisions in the Education Article or elsewhere that apply to a county Board. All architectural and engineering contracts must be awarded through one of two designated processes as contrasted with Educ. Art. § 5-417, which authorizes a county Board, without any State involvement, to employ its own architects.

Thus, the General Assembly has imposed requirements on and standards for county Board procurements that are different from the requirements and standards contained in the General Procurement Law. It is not possible that the legislature could have intended that these different and inconsistent laws be harmonized by this Board applying provisions of the General Procurement Law to some issues and the specific provisions of the Education Article to others. Rather, it would appear that the Legislature intended the aforementioned provisions of the Education Article to be applicable to a county Board procurement and that the dispute resolution procedures set forth or adopted pursuant to the provisions of the Education Article should likewise apply to disputes arising over procurements involving education. This Board only has jurisdiction over disputes pursuant to the procedures as set forth or adopted pursuant to regulations under the General Procurement Law with respect to certain specific non-exempt procurements by units as defined in the General Procurement Law. See Generally Long Fence Company, Inc., MSBCA 1607, 3 MSBCA ¶286(1991) at pp. 4-7; Eastern Shore Associates et al., MSBCA 1517, 1518 and 1519, 3 MSBCA ¶259(1990) and cases cited at p. 8 fn. 7; Hills Capitol Security, Inc., MSBCA 1615, 3 MSBCA ¶294(1992).

Cases from the Maryland Court of Appeals make clear that the State Board of Education has very broad statutory authority over the administration of the public school system in this State.



Under Educ. Art. § 2-205(g)(2), the State Board is directed to “exercise general control and supervision over the public schools and educational interest of this State.” Section 2-205(b) requires the State Board to “[d]etermine the elementary and secondary educational policies of this State;” § 2-205(c) directs the State Board to “adopt bylaws, rules, and regulations for the administration of the public schools.” Section 2-205(e) provides that the State Board “shall explain the true intent and meaning of the provisions of [the Education Article] within its jurisdiction” and mandates the State Board to “decide all controversies and disputes under these provisions” and further states that “the decision of the [State] Board is final.”

The totality of these provisions has been described as a power of such comprehensive character as to vest the State Board “with the last word on any matter concerning educational policy or the administration of the system of public education.” Resetar v. State Board of Education, 284 Md. 537, 556(1979) cert. denied, 444 U.S. 838 (1979); Wilson v. Board of Education of Montgomery County, 234 Md. 561, 565 (1964). The broad sweep of the State Board’s power has been consistently recognized and applied since the principle was first announced in 1879 in Wiley v. Allegany County School Commissioners, 51 Md. 401. See cases cited in Board of Education of Prince George’s County v. Waeldner, 298 Md. 354, 360(1984).

Educ. Art. § 4-205(c) vests the State Board with jurisdiction over controversies and disputes involving administration of the public school system. In Board of Education of Garrett County v. Lendo, 295 Md. 55, 65-66(1982), the Court of Appeals held that the State Board has an affirmative obligation to hear all appeals concerning controversies and disputes involving the rules and regulations of the county Board and the proper administration of the county public school systems. Furthermore, the Court “has firmly adhered to the rule that statutorily prescribed administrative and judicial review remedies must ordinarily be pursued and exhausted.” Washington Suburban Sanitary Comm’n v. C.I. Mitchell and Best Co., 303 Md. 544, 553-54(1985), quoting Maryland Comm’n on Human Relations v. Mass Transit Administration, 294 Md. 225, 230 (1982).

The importance of transportation as an element in education has been recognized by the mandate of the General Assembly that a portion of the cost of transporting children to the public schools be borne by the State. Educ. Art. § 5-205. In recognition of the importance of transportation as an element in education, the Court of Appeals has concluded that public school student transportation “is an integral part of education as we know it today.” McCarthy v. Board of Education of Anne Arundel County, 280 Md. 634, 649 (1977).

Consistent with its statutory mandate to review controversies and disputes arising at the local school system level, including disputes involving student transportation, the State Board has reviewed, and issued six opinions over the years involving disputes arising out of county Board procurements including transportation contracts.<sup>7</sup> See, Caroline Bickling v. Caroline County Board of Education, 6 Op MSBE 80 (1991) (affirming county Board’s decision regarding award of school

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<sup>7</sup> Regarding a purely legal contractual question, the Court of Appeals has held that a contractor may seek review before the State Board or in a circuit court either directly or on review of the State Board decision. Board of Education for Washington County v. Cearfoss, 165 Md. 178(1933); Accord, S.B. Construction Co., Inc. v. Montgomery County Board of Education, 3 Op. MSBE 595 (1984).

bus route contract); Landon Systems Corp. v. Montgomery County Board of Education, 5 Op MSBE 447 (1989) (granting summary affirmance to county Board on its decision regarding lowest responsible bidder); Holloway Transit, Inc. v. Wicomico County Board of Education, 5 Op MSBE 431 (1989) (upholding county Board policy decision to limit the number of bus contracts that family group may hold); Clyde's Bus Service v. Anne Arundel County Board of Education, 3 Op MSBE 621 (1984) (termination of bus contract because of vision problems of bus driver).

Statutes whenever possible are to be harmonized and read together with, if possible, effect given to all parts thereof. See Board of Education of Garrett County v. Lendo supra, at pp. 62-63. This principle is accomplished by interpreting the Education Article to apply to county Board education procurement issues to include dispute resolution and the General Procurement Law to apply to other procurement issues including dispute resolution as set forth therein. This is not an illogical or unreasonable reading of these two statutes, harmonizes their effect and gives vitality to each. Such a reading is also consistent with the fact that the General Assembly has been enacting and re-enacting the two statutes and making changes thereto simultaneously for some seventeen years. It would be non-sensical for the Legislature to do this if it intended one of the statutes to have no effect.

On the basis of the principles of statutory construction set out above and the case law precedent cited, we find it is the Board of Education and not the State Board of Contract Appeals that is the appropriate State-level administrative body to review Appellant's procurement dispute.

Accordingly, the Appellant's appeal is dismissed for lack of jurisdiction.

Wherefore, it is ORDERED this 10th day of April, 1998 that the appeal is dismissed.

Dated: April 10, 1989

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Robert B. Harrison III  
Chairman

I concur:

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Candida S. Steel  
Board Member

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Randolph B. Rosencrantz  
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

**(a) Generally.** - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

**(b) Petition by Other Party.** - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2053, appeal of Annapolis Bus Co., Inc., et al. under Anne Arundel County Board of Education Solicitation No. 98-78 for Student Transportation Services.

Dated: April 19, 1998

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Mary F. Priscilla  
Recorder

