ture under the provisions of Section 6 (k) of Chapter 232 of the Acts of 1965, is clearly to be paid by the builders and contractors, and said builders and contractors no longer act as retail merchants in the transfer of tangible personal property to the construction projects they are performing.

This Opinion is limited to answering your question as to the tax liability which will arise if contracts of the class described are performed. No opinion is expressed, nor is it within my province to express an opinion, as to the effect, if any, the unexpected shifting of the tax burden may have on the duties or obligations of either party to such a contract.

OFFICIAL OPINION NO. 18
June 11, 1965

Hon. Jack L. New
Treasurer of State
242 State House
Indianapolis, Indiana

Dear Mr. New:

This is in response to your request for my Official Opinion in answer to the question of whether the “Depository Act of 1937,” as amended, being the Acts of 1937, ch. 3, as amended, as found in Burns IND. STAT. ANN. (1961 Repl.), §§ 61-622 to 61-682, applies to certificates of deposit acquired by the State Office Building Commission pursuant to the Acts of 1965, ch. 203, § 2. Simply stated, your question is whether such certificates of deposit constitute “public funds,” and if so, whether they are subject to the requirements of said depository act. As used in said depository act, the term “public funds” is defined by the Acts of 1937, ch. 3, § 1 (e), as amended, as found in Burns IND. STAT. ANN. (1961 Repl.), § 61-622 (e) as follows:

“(e) The term ‘public funds’ means and includes all funds coming into the possession of the treasurer of state, treasurer of the board of trustees of any state benevolent, penal or educational institution, and all funds coming into the possession of any state officer
by virtue of such office, and all funds coming into the possession of any local officer by virtue of such office, but shall not mean nor include funds coming into the possession of any public officer which are not impressed with a public interest nor designed for a public use: Provided, That the term 'public funds' shall mean and include all fees and funds of whatever kind or character received by judges or clerks of city courts or justices of the peace courts by virtue of their offices."

Also, the term "state officer" is defined by said act—the Acts of 1937, ch. 3, § 1 (a), as amended, as found in Burns IND. STAT. ANN. (1961 Repl.), § 61-622 (a)—as follows:

"(a) The term 'state officer,' or the plural thereof, means any person or persons elected or appointed to any office of the state government and includes all boards, commissions, departments, institutions and other bodies established by law to function as a part of the state government and which are supported wholly or partly by appropriations of money made from the state treasury, or which are supported wholly or partly by taxes or fees."

It may be noted that you have a multiple interest in this question, in that not only are you the Treasurer of State, and as such are an ex officio member of the State Board for Depositories as provided by the Acts of 1937, ch. 3, § 22, as found in Burns IND. STAT. ANN. (1961 Repl.), § 61-643, and, as such Treasurer of State, you are also the legal custodian of the "public depositories insurance fund" as provided by the Acts of 1937, ch. 3, § 20, as found in Burns IND. STAT. ANN. (1961 Repl.), § 61-641, but also you are, by action of the State Office Building Commission, the treasurer of such commission. However, because the statutory duties of the Treasurer of State do not require that you also be the treasurer of the State Office Building Commission, the monies which you receive on behalf of the commission are not received by you as the Treasurer of State, which distinction is fully discussed in 1958 O.A.G., p. 204, No. 47. Nevertheless, the commission may empower you to act as its treasurer so long as there is no compensation received or agreed upon between
yourself and the commission, as held in Book v. State Office Building Commission, 238 Ind. 120, 149 N.E.2d 273 (1958), said case also holds that the State Office Building Commission, is a commission for performing duties and functions required to be performed in carrying out the provisions of the act which rest within the executive administrative department of state government. Thus, subject to the exceptions found in the case of Book v. State Office Building Commission, supra, the commission is an instrumentality of the state and, as such, would constitute a commission under Burns 61-622 (a) supra. Thus, the funds which you receive on behalf of the State Office Building Commission are received by you as a state officer by virtue of your office as treasurer of a state commission and any "public funds" so received would be subject to the requirements of the "Depository Act of 1937," as amended, supra, unless there is some other statutory provision which supersedes the general requirements of said depository act.

It has been held that whenever there are two statutes, each of which presumably governs a certain fact pattern, and one of such statutes is general and includes the particular fact pattern although not specifically but by inclusion with all other fact patterns in a general classification, and there is another statute which is special, in that it includes and is applicable only to the particular fact pattern in issue, then the special statute is construed to be the controlling statute and particularly where it has been enacted subsequent to the general statute. Sutherland Statutory Construction, 3rd Ed., Vol. 1, § 2022, p. 488. In this situation, the above rule of statutory construction seems most appropriate. The "Depository Act of 1937," as amended, supra, is a statute of general application and concerns the manner of protecting the "public funds" of not only the state and state agencies, but also of municipal corporations, such as counties, cities, towns, townships, school cities, school towns, school townships, taxing districts, special assessment districts and includes the fees and funds received by judges or clerks of city courts or justices of the peace courts by virtue of their offices.

On the other hand, the Acts of 1965, ch. 203, should be considered as a special act providing a particular means of protecting the "public funds" of the State Office Building
Commission whenever they are invested as authorized by § 2 of said Act, which section reads, in part, as follows:

"SEC. 2. Acts 1953, c. 221, is amended by creating and adding thereto a new and additional section to be numbered 14B and to read as follows: Sec. 14B. The proceeds of the refunding debentures issued pursuant to Section 14A of this Act shall be placed in escrow and applied, with any other available funds, to the payment on the date selected for redemption of the principal, accrued interest and any redemption premiums of the debentures being refunded, and, if so provided or permitted in the resolution authorizing the issuance of such refunding debentures, may also be applied to the payment of any interest on such refunding debentures, and any costs of refunding. Pending such application, such escrowed proceeds may be invested in direct obligations of, or obligations the principal of and the interest on which are unconditionally guaranteed by the United States of America, which shall mature, or which shall be subject to redemption by the holder thereof at the option of such holder, not later than the respective dates when the proceeds, together with the interest accruing thereon, will be required for the purposes intended. In lieu of such investments, all or part of such proceeds may be placed in interest bearing time certificates of deposits with such bank or banks as the commission shall determine or other similar arrangements may be made with such bank or banks with regard thereto which will assure that such proceeds, together with the interest accruing thereon, will be available when required for the purposes intended, provided that such time certificates of deposits or other similar arrangements shall be secured to the full amount thereof by direct obligations of, or obligations the principal of and the interest on which are unconditionally guaranteed by, the United States of America of the type permitted for direct investment of the escrow fund. . . ." (Emphasis added.)

Thus, from the above-emphasized language of said § 2, it is obvious that the Legislature intended, with respect to such
time certificates of deposit, that they not, of necessity, be secured according to the requirements of the “Depository Act of 1937,” as amended, but rather that the investment of the escrowed proceeds from the sale of the refunding debentures in time certificates of deposit requires only the safeguard of such funds by security to the full amount thereof.

“. . . by direct obligations of, or obligations the principal of and the interest on which are unconditionally guaranteed by, the United States of America of the type permitted for direct investment of the escrow fund. . . .”

By comparison with said provisions of the Acts of 1965, ch. 203, § 2, supra, reference is made to the Acts of 1957, ch. 24, § 1, as amended, as found in Burns IND. STAT. ANN. (1964 Supp.), § 61-681, which provides as follows:

“In addition to all other powers conferred by law upon the state board of finance, it may, upon the certification of the treasurer of state that cash of the state of Indiana on deposit is in excess of the daily cash requirements of the state of Indiana anticipated for the next succeeding semi-annual fiscal period, authorize the treasurer of state to deposit such excess of funds in certificates of deposit issued by state banks or trust companies, by mutual savings banks or by national banks having their principal offices within this state. Such certificates of deposit shall mature by their terms not less than six [6] months from the date of the issuance thereof, and shall bear interest at a rate of two per cent [2%] per annum, from which interest otherwise payable shall be deducted such public depository insurance assessment, if any, as the bank or trust company, or mutual savings bank or national bank may be required to pay on account of such certificates of deposit by virtue of the provisions of the Depository Act of 1937, as amended, the same being chapter 3 of the Acts of 1937 [§§ 61-622—61-663]. Such certificates of deposit may validly provide that unless and until the treasurer of state shall give the issuing bank not less than thirty [30] days written notice of his intention to withdraw the same in whole or in part at the maturity.
thereof, each such certificate of deposit shall be automatically renewed at its maturity for an additional term of six [6] months.” (Emphasis added.)

Concerning Burns 61-681, supra, it is particularly noticeable, with respect to the investment of "cash of the state of Indiana on deposit ... in excess of the daily cash requirements of the State of Indiana anticipated for the next succeeding semi-annual fiscal period," that you are authorized to invest such excess funds in certificates of deposit but it is contemplated that such certificates are to be safeguarded by the general provisions of the "Depository Act of 1937," as amended, for said section expressly provides for the amount of the public depository insurance assessment to be deducted from the interest otherwise payable and to be paid into the insurance fund. By contrast, the Acts of 1965, ch. 203, § 2 contains no such provision, but relies wholly upon a mandatory, yet different means of safeguarding the time certificates of deposit authorized thereby, which means may be construed to be the only necessary method for protecting such investments.

Your letter of inquiry states that the resolution intended to be adopted by the State Office Building Commission will include a provision requiring each bank issuing such certificates of deposit to secure the same by pledging United States government obligations to the full amount thereof in conformity with § 2 of the Acts of 1965, ch. 203, supra. Since the authority of the State Office Building Commission to invest the proceeds from the sale of the refunding debentures in time certificates of deposit is upon the condition that such be secured as provided in the Acts of 1965, ch. 203, § 2, supra, it is, therefore, my Opinion that such security is to be deemed as fully safeguarding such time certificates of deposit, thereby obviating the necessity for also complying with the provisions of the "Depository Act of 1937," as amended. Based upon the fulfillment of this condition, the payment of assessments into the public depositories insurance fund is not required of such banks when the proceeds attributable to the sale of refunding debentures are invested in time certificates of deposit in accordance with the Acts of 1965, ch. 203, § 2, supra.