ship, school corporation, public utility owned or operated by any city of the second, third, fourth or fifth class or by any town, or other political subdivision or commission created by law, excepting the state highway department, to adopt plans and specifications and award a contract for such public work or improvement to the lowest and best bidder who submits a bid for the performance thereof * * *"

For the same reasons as given in regard to the applicability of the statutes concerning a prevailing wage scale to state supported colleges and universities, it is my opinion that this section is also applicable to such colleges and universities.

In summary hereof:

1. It is my opinion that state supported colleges and universities must comply with the provisions regarding the establishment of minimum wage rates before awarding contracts which require the expenditure of funds derived from taxation, except when such contract involves the use of federal funds.

2. Further, it is my opinion that state supported colleges and universities must advertise for bids, when expending funds derived from taxation, when the amount of the proposed improvement contract exceeds $2,000.00.

OFFICIAL OPINION NO. 54

September 15, 1964

Mr. Roger R. Shipley, Controller
State Highway Commission
1104 State Office Building
Indianapolis, Indiana

Dear Mr. Shipley:

You have requested an Official Opinion relative to the State Highway Commission withholding gross income tax on payments due out-of-state contractors where these out-of-state contractors have been licensed by the Secretary of State to

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do business in Indiana. Your specific question is stated as follows:

"* * * Therefore, it is requested that an official opinion be written for the guidance of this office, covering the following point.

"The responsibility of the State Highway Commission relative to withholding Indiana Gross Income tax on payments to out-of-state contractors."

In answer to your question, we invite your attention to the provisions contained in Section 1(1) of the Indiana Gross Income Tax Act, being the Acts of 1933, Ch. 50, as amended, and found in Burns' (1964 Supp.), Section 64-2601(1), which reads as follows:

"The term 'withholding agent' means any person and includes all individuals, corporations, associations, firms, companies and partnerships in whatever capacity acting, including lessees or mortgagors of real or personal property, agents, fiduciaries, employers, the state of Indiana, and each agency and instrumentality thereof * * * and all officers and employees of the state, and each agency and instrumentality thereof * * * having the control, receipt, custody, disposal or payment of interest, dividends, rentals, salaries, wages, premiums, annuities, compensations, principals, remuneration, emoluments, and all fixed or determinable gross income taxable under this act, including payments for the performance of contracts within the state of Indiana and receipts from the sale of any personal property sold in the state of Indiana."

(Our emphasis)

By the terms of the above-quoted section of the Gross Income Tax Act, the State Highway Commission is within the definition of a "withholding agent." The Indiana State Highway Commission, its officers and employees, as a withholding agent must therefore perform the duties enjoined on it by law to withhold gross income taxes due to Indiana by any entity or person subject to withholding under the provisions of the Gross Income Tax Act. Such provisions are found in Section
17(f) of the Indiana Gross Income Tax Act, as amended, being the Acts of 1933, Ch. 50, Sec. 17, and found in Burns' (1964 Supp.), Section 64-2617(f), which reads as follows:

“(f) For the calendar year 1947, and for each calendar year thereafter, each withholding agent, as defined in section 1(1) of the Gross Income Tax Act, as amended, shall deduct and withhold from all payments made for the performance of contracts within the state of Indiana by nonresident contractors, except contracts of sale, the receipt of which payments are subject to tax under the provisions of this act and regulations issued and approved for the administration of this act, an amount computed by the application of the highest rate applicable to any portion of said receipts as prescribed by section 3 of this act, as amended, to that portion of such income which exceeds the amount of annual exemption, provided by section 5 of this act, as amended.” (Our emphasis)

The language contained in Section 17(f), supra, as to the withholding responsibilities in respect to tax liability upon receipts from the performance of the contracts in the State of Indiana by nonresident contractors, is clear and unambiguous. The statute says that each withholding agent shall withhold in respect to nonresident contractors having a tax liability upon receipts received from the performance of contracts within the State of Indiana. Apparently, the only provision to be interpreted or construed would be whether or not a contractor is a nonresident contractor.

The Indiana Legislature in 1963 enacted the Indiana Adjusted Gross Income Tax Act, Acts 1963 (Spec. Sess.), Ch. 32, as found in Burns' (1964 Supp.), Section 64-3201 et seq. Under the Adjusted Gross Income Tax Act, the individual proprietorship which acts as a contractor, whether resident or nonresident, would be subject to tax liability under the provisions of said act and not the Gross Income Tax Act after June 30th, 1963. It would follow, therefore, that the answer to your question would only apply to corporate entities acting as contractors when said corporate entities are nonresidents of the State of Indiana.
Such a requirement for withholding of taxes of nonresident contractors, if it is decided that such words include foreign corporations admitted to do business in Indiana, could be considered to be violative of the Acts of 1929, Ch. 215, Sec. 57, as amended, and found in Burns' (1964 Supp.), Section 25-302, and reads, in part, as follows:

"Except as hereinabove provided, a foreign corporation admitted to do business in this state shall have the same, but no greater, rights and privileges, and be subject to the same liabilities, restrictions, duties and penalties, now in force or hereafter imposed upon domestic corporations of like character, and to the same extent as if it had been organized under this act to transact the business for which its certificate of admission is issued."

In discussing foreign corporations admitted to do business in a state under equality statutes generally, the following statement is found in 23 Am. Jur., Foreign Corporations, § 322:

"* * * A foreign corporation lawfully in the state is protected by such provisions, however, and additional burdens and restrictions discriminating against foreign corporations may not be imposed upon it after admission. Of course, the imposition of added requirements violates no such contract right where substantially the same duties are imposed on like domestic corporations, and where the requirements constitute such a valid exercise of the state's police power that as applied to domestic corporations they involve no impairment of the obligation of the charter contract * * *"

Although domestic corporations are not subjected automatically to such provision that withholding agents withhold gross income taxes that might be owing by them to the State of Indiana, substantially the same provision may be made applicable to such corporations by the provisions of the Acts of 1933, Ch. 50, Sec. 17, as amended, and found in Burns' (1964 Supp.), Section 64-2617(b), which reads as follows:
“(b) Whenever the department shall find that any taxpayer has not, or is not, properly reporting and paying tax on income from interest, dividends or other fixed and determinable annual or periodical gross income of whatever kind and in whatever form paid or credited, including all other gross income not included in subsection (a) of this section, which income is subject to the tax imposed by this act, the department may, by service of written notice and demand, which notice shall name such taxpayer affected, require any withholding agent to deduct and withhold from all such income due such taxpayer an amount computed by the application of the rate prescribed by Section 3 of this act, as amended, to that portion of such income paid or credited, or to be paid or credited, in the calendar year, by such withholding agent to such taxpayer, which exceeds the amount of annual exemption, provided by section 5 of this act, as amended.”

From the above sections it is apparent that the withholding tax provisions were adopted as a method of insuring that gross income taxes owing the State of Indiana were paid and that an inherent danger existed in regard to collection of such taxes from nonresident contractors. As a practical matter, such danger may be less apparent in cases where foreign corporations are possessed of large amounts of tangible personal property in Indiana than in the case of domestic contractors with little property present in Indiana, but the Legislature has not seen fit to make such exception. The statutory regulation is based on a reasonable ground and is not arbitrary or capricious.

In addition, no different duties are imposed on the foreign corporation in regard to reporting or payment of taxes and the tax finally determined as owing is computed on the same basis. The only discriminatory effect that might result from the application of such statute would be the retention of and payment to the state of taxes in an amount in excess of the actual tax owed and require the filing of a request for a refund. Such inequity, if it may be so called, is present in any case wherein any taxpayer is subject to withholding.
and would not be of such merit as to invalidate this provision of the Gross Income Tax Law.

Before proceeding to determine whether a foreign corporation admitted to do business in Indiana is included in the phrase "nonresident contractors," it is necessary to note an instruction contained in the Gross Income Tax Regulations of 1956 on page 90, which reads as follows:

"INSTRUCTION 3-32. WITHHOLDING THE TAX UPON CERTAIN INCOME OF NON-RESIDENTS
* * *

"Under an amendment to the Act (Sec. 17(e), effective January 1, 1947), all withholding agents as defined in Section 1(1), who are payers of gross income to non-residents for the performance of contracts in Indiana (except contracts for sale only), must deduct and withhold one percent of all amounts in excess of $1,000 paid or credited to such non-resident contractors in a calendar year however, such requirements for withholding will be waived if the non-resident contractor is a corporation which is licensed to transact business in Indiana by the Secretary of State. (See Sec. 17(e) and Chapter 10.)"

The Supreme Court of Indiana in the case of Department of Insurance of Indiana et al. v. Church Members Relief Association (1940), 217 Ind. 58, 26 N.E. (2d) 51, made the following statement regarding construction of statutes by state officials on page 53 thereof:

"A so-called practical construction, which apparently means a departmental construction, of a statute is not binding or conclusive upon the state or upon the court. Such a construction may be looked to and considered by the court in construing and interpreting an ambiguous statute, but it cannot in any manner affect the operation or construction of a non-ambiguous statute. (cases cited)"

The question of whether a foreign corporation admitted to do business in a state becomes a resident of such state
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has been frequently considered by many courts and the general theory as established in these cases is expressed in 23 Am. Jur., Foreign Corporations, § 35, which reads, in part, as follows:

"Upon the theory that a corporation can only 'reside' in, or be an 'inhabitant' of, the place where it legally exists and has its domicil in law, the rule laid down by the earliest decisions and followed in numerous cases is that a corporation is a 'resident' and an 'inhabitant' of the state in which it is incorporated, and not of any other, although it may be engaged in business within such other. Under this rule, a corporation created in one state does not become a resident of another by engaging in business there, even though licensed by the latter state and in terms given all the rights and privileges of a domestic corporation * * *

Also Section 36, which reads, in part, as follows:

"While it is true that if the term 'resident' relates to legal domicil, a foreign corporation is a resident only of the state of its incorporation, the term is not universally used in this sense. Many decisions, including a number from courts which approve the foregoing rule as technically correct and frequently controlling, support the view that for certain purposes at least, a practical residence within the jurisdiction may be considered apart from the legal residence or domicil of the corporation, and that 'foreign corporation' and 'nonresident corporation' are not necessarily always synonymous terms * * *

In reviewing decisions by Indiana courts, no departure was found from the general rule that a corporation may have only one place of residence and that is in the state of its incorporation. In many areas a corporation admitted to do business in Indiana is treated as a resident but technically its residence remains in the state of its incorporation.

It is stated in the case of Aspinwall et al. v. The Ohio & Mississippi R. R. Co. et al. (1863), 20 Ind. 492, 496, 497, the Indiana Supreme Court stated as follows:
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"* * * * a corporation can have no legal existence out of the boundary of the sovereignty by which it is created. It exists only in contemplation of law, and by force of law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But, although it must live and have its being in that State only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one State creates no insuperable objection to its power of contracting in another.' This doctrine has been adopted by text writers on corporations, and by Courts in judicial decisions * * *"

Also, in the case of The Western Union Telegraph Co. v. Dickinson (1872), 40 Ind. 444, 445, it was stated as follows:

"That corporations are citizens within the meaning of the clause of the constitution of the United States which extends the judicial power of the courts of the United States to controversies between citizens of different states, is settled beyond controversy, and that they are citizens only of the state or sovereignty that created them * * *"

The latter case is referred to in Amsden v. Norwich Union Fire Ins. Soc. (1890), 44 Fed. 515, 517, in which the court states as follows:

"Another objection made to the jurisdiction of this court is that the parties on both sides of the cases are citizens of Indiana. The defendants, it is conceded, are corporations of other states, but they had filed from time to time with the auditor of state the statements and instruments required by section 3765 of the Indiana statutes (Revision of 1881), 'authorizing their agents doing business in the state to acknowledge service of process for and on behalf of the companies, and consenting that service of process upon such agents should be taken and held to be as valid as if served upon the company according to the laws
of the state; and it is insisted that by so doing they become resident citizens of the state within the meaning of the removal act. This position is supported by the decisions in Scott v. Cattle Co., 41 Fed. Rep. 225; Zambrino v. Railway Co., 38 Fed. Rep. 449; but the weight of authority, and, as it seems to me, sound reason, are the other way. There is, I think, no well-considered exception to the rule that the residence and citizenship of a corporation must be in the jurisdiction of its creation. It may send its agents into other states to do business, and may consent to be sued there in the state courts by means of process served upon its agents; but even if so intended, it could not thereby effect a change of residence or citizenship * * *”

From the above, I conclude that a foreign corporation admitted to do business in Indiana, if a contractor, is included in the phrase “non-resident contractor.”

In answer to your question, it is my opinion that the State Highway Commission is considered a withholding agent for taxes to be withheld under the Gross Income Tax Law and that as such withholding agent it is required to withhold such taxes from nonresident contractors which term includes foreign corporations admitted to do business in Indiana.

OFFICIAL OPINION NO. 55

September 16, 1964

Mr. B. B. McDonald
State Examiner
State Board of Accounts
912 State Office Building
Indianapolis, Indiana

Dear Mr. McDonald:

This is in response to your request for an Official Opinion on the following questions:

“Some question has arisen as to whether or not there is a conflict between the statutes (Burns’ 60-1805 Sec-