tion of his first employment, the length of time between such employments being immaterial."

In this instance, both of the "employers," the city and the board of sanitary commissioners, would be considered to be included in the fund at the precise moment the city effected withdrawal and the board extended coverage to its employees as a "participating unit," and thus the service credits of the employees would remain unimpaired under the terms of Burns' 60-1624, supra, and the unliquidated liability for prior service would be prorated between the employers concerned in a basis determined by the board of trustees of the Public Employes' Retirement Fund.

Since the city extended Public Employes' Retirement Fund coverage to all of its employees in 1953, all of the city employees so covered were required by statute to contribute to the fund from that time until the date of withdrawal of the city from the fund. There are no statutory provisionsexcusing participation because a unit anticipates withdrawing, and the city was thus without authority to deny such participation to any employees. The fact that some city employees were not required to make payments to the fund during this six year period because they could not acquire ten years of service by the termination of the city's period of participation in the fund would not affect such employees' rights to creditable service for such period.

OFFICIAL OPINION NO. 53

July 31, 1962

Hon. Joseph L. Hensley
State Representative
251 Hargon Drive
Madison, Indiana

Dear Representative Hensley:

This is in response to your letter of July 7, 1962, wherein you asked my Official Opinion concerning the legality of a "* * * new policy aimed at giving Hoosier dealers an extra advantage over out-of-staters in bidding for State coal con-
tracts as announced * * * by James H. Berg, Deputy Commissioner of the Department of Administration.”

Your letter further states: “* * * this bidding procedure would allow Indiana coal producers, after the bids had been opened, to match the lowest bid of an out of state producer and be awarded the contract.”

The Financial Reorganization Act of 1947, being the Acts of 1947, Ch. 279, Sec. 3, as found in Burns’ (1961 Repl.), Section 60-1803, created the Division of Public Works and Supply, and Section 4 of said Act, as found in Burns’ (1961 Repl.), Section 60-1804, authorized the governor to appoint a Director of Public Works and Supply, and Section 5 of said Act, as amended and found in Burns’ (1961 Repl.), Section 60-1805, reads, in part, as follows:

“Subject to other applicable provisions of this act [§§ 60-1801—60-1835] and to other laws not inconsistent herewith, the director of public works and supply [department of administration] shall have the following powers and duties respecting all agencies of the state except as herein otherwise provided:

“(1) To purchase, rent or otherwise provide for the furnishing of all supplies, materials, equipment, printing and contractual services; to prescribe standard specifications for supplies, materials and equipment; to provide for inspecting and testing the same, and otherwise to enforce compliance with such specifications.”

The above section gave the director the right to make purchases which would include coal.

Under Section 11 of the Financial Reorganization Act of 1947, supra, as found in Burns’ (1961 Repl.), Section 60-1811, it is stated:

“(a) Except as otherwise provided by this act [§§ 60-1801—60-1835], all contracts for construction or repairs and all purchases of, and all contracts for, supplies, materials, purchase or rental of equipment, and contractual services covered by this act shall be based on competitive bids and all awards shall be to the lowest and best bidder after advertising for bids as herein
provided; * * * (b) If the amount of the ultimate expenditure involved in a purchase is estimated to exceed five thousand dollars [$5,000], sealed bids shall be solicited by public notice inserted once each week for two [2] successive weeks before the final date of submitting bids in one [1] newspaper of general circulation in Marion County, Indiana. The director of public works and supply [department of administration] shall designate the newspaper for such publication, and may designate different newspapers according to the nature of the purchase or contract and may publish additional notices in his discretion. The said director shall also solicit sealed bids by sending notices by mail to prospective bidders known to him, and by posting notices on a public bulletin board in his office at least five [5] days before the final date of submitting bids. All bids shall be sealed when received and shall be opened in public at the hour stated in the notice. All original bids, together with all documents pertaining to the award of a contract, shall be retained and made a part of a permanent file or record which shall be open for public inspection. * * *"

The above section required the Director, Division of Public Works and Supply (now Commissioner of Department of Administration) to advertise for bids and provided the method to be used in soliciting bids.

Section 13 of the Financial Reorganization Act of 1947, supra, as found in Burns' (1961 Repl.), Section 60-1813, provides as follows:

“All contracts, purchases and sales made by or under the supervision of the director of public works and supply [department of administration] or any state agency for which competitive bids are required shall be awarded to the lowest and best bidder in the case of purchases, or the highest responsible bidder in the case of sales, taking into consideration conformity with specifications, terms of delivery, and other conditions imposed in the call for bids. The director of public works and supply [department of administration] shall decide as to the lowest and best bidder for all purchases
or the highest responsible bidder for all sales. As to contracts for the purchase of highly skilled or professional services which are not properly subject to competitive bidding, the head of the interested state agency shall submit his recommendation to the director of public works and supply [department of administration]. A bid shall be rejected if it contains any alteration or erasure. Said director shall reject the bid of any bidder who has failed to perform satisfactorily a previous contract with the state or has failed to comply with the laws of this state concerning taxation. A record shall be kept of all bids, with names of bidders and amounts of bids, and with the successful bid indicated thereon. The director of the division of public works and supply [department of administration] shall record all bids received pursuant to notices as required by section 11 [§ 60-1811] of this act, in a permanent record to be known as 'bidder’s record.' Said record to be prescribed by the state board of accounts and shall be open at all times to the inspection of the public and shall have entered thereon all bids received, purchase order numbers, to whom awarded, and the reason for rejection if the low bid is not accepted.”

This section gives the Director, Division of Public Works and Supply (now Commissioner of the Department of Administration) the power to decide as to the lowest and best bidder. In other words, the commissioner has the discretion within certain limitations to determine who is the lowest and best bidder.

Under the Acts of 1961, Ch. 269, Sec. 4, as found in Burns’ (1961 Repl.), Section 60-104, known as the Administration Act of 1961, there was created a department of state government known as the Indiana Department of Administration, and under Section 2 of said Act, authority was given the Governor to appoint a commissioner as executive head:

Burns’ 60-104, supra, reads, in part, as follows:

“The department shall have the following duties and functions, subject to the other provisions of this act and to other laws not inconsistent therewith:
“(a) Execute and administer all appropriations made by law in the manner and according to the provisions therefor as provided by law, and execute and administer all provisions of law which impose duties and functions upon the executive department of government including particularly executive investigation of state agencies supported by appropriations, and the assembly of all required data and information for the use of this department, and the legislative division.

“(b) Purchase or contract for the supplies, materials, articles, equipment, printing and utility services needed by state departments, institutions and agencies; prescribe standard specifications therefor and enforce compliance with such specifications; supervise and regulate the making of purchase contracts by state institutions; regulate the requisitioning and storage of purchased items, the disposal of surplus and salvage, and the transfer to or between state departments of needed supplies, equipment and materials, all in accordance with the free and open bidding, and in accordance with all present laws as to notices of purchase and bidding and all requirements presently applicable to the Division of Public Works and Supply of the State of Indiana. The department shall promulgate rules governing purchasing practices, but no such rules shall have the effect of abrogating present statutes or safeguards imposed to protect the public interest in connection with state purchases; and all rules and regulations shall be designed and limited in scope and intent to achieve competition in bidding and purchasing and to obtain the lowest possible cost to the State of Indiana.”

In Section 9 of said Act, as found in Burns’ (1961 Repl.), Section 60-109, it is said:

“The division of public works and supply is hereby abolished and all its legal duties and powers, its records and property, and its personnel are hereby transferred to the Indiana department of administration. All references in the laws of this state, or in any documents, to said division shall be deemed to refer to the department of administration.”
Therefore the Commissioner of the Department of Administration has succeeded to all the authority and power herefore held by the Director of the Division of Public Works and Supply.

In 43 Am. Jur., Public Works and Contracts, § 23, pages 764 and 765 read, in part, as follows:

"Contracts for the performance of work or the supplying of materials are let, ordinarily, as an incident of procedure prescribed by statute or municipal law the purpose of which is to secure competitive bidding on the part of intending contractors, and prevent favoritism, collusion, and fraud in the letting of such contracts to the detriment of the public; and generally, in order to hold a public body liable on contracts entered into by its agents or officers, the statutory method of execution must be complied with. Practically all public contracts of major importance are let upon competitive bidding if the nature of the contract reasonably permits of that procedure * * *"

In 43 Am. Jur., Public Works and Contracts, § 44, page 786, the following statement is found:

"When the controlling statute or ordinance requires without qualification the letting of public contracts to the lowest bidder, the duty of awarding the contract is generally held to be ministerial and not judicial, and must be performed without exercise of discretion, that is to say, the contract must be awarded to the one whose bid is actually the lowest. * * *"

Usually, however, the statutes vest public officers and boards with discretion in this respect, and their decision when based upon an honest exercise of the discretion vested in them will not be interfered with by the courts, and under Burns' 60-1813, supra, the Commissioner of the Department of Administration does have a discretion in determining the lowest and best bidder.

In my 1953 O. A. G., page 109, No. 24, I had under consideration a question from the Director, Division of Public Works and Supply asking: "* * * what discretion I may have in
determining the lowest and best bidder in case of purchases by the State of Indiana * * *. In that Opinion the following statements are included:

"In order to answer your question it is necessary to determine first what is the lowest or best bidder.

"It has frequently been held that a statute requiring the acceptance of the lowest and best bidder is not a mandate to accept the lowest bid, e. g.

"Boseker v. Wabash County Commissioners (1882), 88 Ind. 267.

"In this regard it has also been held that the word ‘responsible’ does not refer solely to pecuniary responsibility only:


"Some of the factors which may be considered are quality of material:

"Mitchell v. Walden Motor Co. (1937), 235 Ala. 34, 177 So. 151.

"* * * the experience, efficiency, and reputation of the bidder:

"Chaffee v. Crowley (1922), 49 N. D. 111, 190 N. W. 308.

"* * * the ability of the bidder to respond and answer in accordance with what is expected or demanded and to fulfill in letter and spirit the contract made with him:

"People v. Dorsheimer (1878), 55 How. Prac. (N. Y.) 118;

"Hallet v. City of Elgin (1912), 254 Ill. 343, 98 N. E. 530.

* * *

"What is in one way the most important consideration of all, the public authorities in granting contracts on bids may take into advisement the accessibility of the bidder and of his source of supply to the granting authorities, the project concerned, and the law enforcement powers of the sovereign:
"Osborn v. Mitten (1926), 30 Ariz. 372, 6 P. (2d) 902.

* * *

"Furthermore, in the application of these principles and facts the granting must not give a mere perfunctory examination to them but must exercise the discretionary powers given them by the Legislature and consider the entire matter in a deliberative fashion, considering the whole problem in its entirety and rendering a decision only after all of the above facts and principles have been brought into harmony with the circumstances of the particular case to form a united and indivisible totality of cause, effect and result:"

(Here follows a list of authorities)

In my 1958 O. A. G., page 4, No. 2, which was also an Opinion to the Director, Division of Public Works and Supply, I stated on page 7:

"* * * Among the many factors which you may consider in the exercise of this discretion are the character, moral worth and integrity of the bidder, and his ability to fulfill in letter and spirit the contract made with him. 1953 O. A. G., page 109, No. 24, and cases cited therein."

Therefore, I must conclude that the Commissioner of the Department of Administration may use discretion in determining the lowest and best bidder. However, you state in your letter that "* * * after the bids had been opened, the Indiana coal producers would be allowed to match the lowest bid of an out of state producer and be awarded the contract." Therefore, should the Commissioner of the Department of Administration allow the Indiana coal producers to match the low bid of out-of-state coal producers, then, in such event it would have the tendency to destroy competition, and in the case of Tousey v. City of Indianapolis et al. (1911), 175 Ind. 295, 300, 94 N. E. 225, the following was cited from the case of American Express Co. v. Southern Ind. Express Co. (1906), 167 Ind. 292, 312, 78 N. E. 1021 wherein the court said: "* * * All rules, practices, customs, and usages designed to destroy competition in business, or necessarily having that effect, are
inimical to the public well-being, and were condemned by the common law * * * *; and citing further, the case of State ex rel. v. Portland, etc. Oil Co. (1899), 153 Ind. 483, 488, 53 N. E. 1089, 74 Am. St. 314, the following language was used:

"It is an old and familiar maxim that 'Competition is the life of trade,' and whatever act destroys competition, or even relaxes it, upon the part of those who sustain relations to the public, is regarded by the law as injurious to public interests and is therefore deemed to be unlawful, on the grounds of public policy."

Cleveland, etc. R. Co. v. Closser (1890), 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. 593;

Knight & Jillson Co. v. Miller (1909), 172 Ind. 27, 87 N. E. 823, 18 Ann. Cas. 1146;

Chicago, etc. R. Co. v. Southern Ind. R. Co. (1906), 38 Ind. App. 234, 70 N. E. 843.

The Acts of 1913, Ch. 228, Sec. 1, as found in Burns' (1951 Repl.), Section 53-104, states as follows:

"Hereafter all municipal bodies, boards or officers of any municipality, township or county in this state, authorized by law to let contracts for public work shall have no authority to require any bidder to submit his bid at any time earlier than the open meeting at which it is to be received. All such meetings for receiving bids shall be open, (to) which the public and all bidders shall be entitled to attend."

It is further stated in the Acts of 1913, Ch. 228, Sec. 2, as found in Burns' (1951 Repl.), Section 53-105, as follows:

"All contracts for public work by any of the boards or officers mentioned in section one of this act which are not let in conformity with the provisions of this act shall be void."

The statutes, referred to herein, definitely define the procedure to be followed in obtaining competitive bids and give the Commissioner of the Department of Administration a wide discretion in awarding the bids to the lowest and best bidder and give the commissioner the right to reject any and all bids;
however, there is nothing in the statutes that permits the Commissioner of the Department of Administration, after the opening of bids, to grant an Indiana producer, who was not the low bidder, another bid to match the low bid of an out-of-state producer.

I am not unmindful of the Acts of 1931, Ch. 91, Sec. 1, as amended and found in Burns' (1952 Repl.), Section 46-1111, which reads as follows:

"The proper purchasing authority of every institution in the state of Indiana which is supported in whole or in part by public funds, and who is authorized and required to purchase coal for fuel purposes in the operation of any such institution, shall be required to purchase and use coal which is mined in the state of Indiana, if the cost of coal mined in the state of Indiana is not greater than the cost of coal mined in any other state or states, including the cost of transportation: Provided, that in the event of an emergency created by the inability for any reason of the purchasing authority of an institution or institutions, after having made a reasonable effort to do so, to procure coal which is mined in the state of Indiana and such emergency is so found by the governor as to one [1] or more institutions, then during such emergency as found by the governor which shall in no event exceed ninety [90] days, and, if necessary, successive periods of like duration, coal may be purchased by the proper purchasing authority of such institution or institutions from any available source.

"Any ordinance of any municipal corporation which discriminates against the use of coal mined in the state of Indiana, shall be null and void on and after the effective date of this act."

However, the provisions of the above section do not apply to bidding procedures and thus are not applicable in a determination of the specific question you have submitted.

Therefore, in my opinion, if the Commissioner of the Department of Administration permitted an Indiana producer to match the low bid of an out-of-state producer after the bid opening, his act in doing so would be illegal.