

Opinion No. 44.

State Purchasing Agent—Right to Contract for Commodities.

HELD: The right of the state to contract for commodities used by the state through the state purchasing agent, is not restricted by the Robinson-Patman Act.

February 15, 1937.

Hon. A. W. Engel
State Purchasing Agent
The Capitol

Dear Mr. Engel:

You have submitted the question whether the State of Montana in making purchase of oils and greases for use in state automotive equipment, is bound by the provisions of H. R. 8442, approved June 10, 1936, commonly called the "Robinson-Patman Act", amending the Clayton Act. Section 2 (a) of the Clayton Act, as amended, provides:

"That is shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such

discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * * .”

It will be noted that there is a limitation on the price discriminations which are prohibited. The discriminations prohibited by the Act are those which, in effect, may be:

- “(1) substantially to lessen competition in any line of commerce; or
- (2) to tend to create a monopoly in any line of commerce; or
- (3) to injure, destroy or prevent competition:
 - (a) with any person who either grants or knowingly receives the benefit of such discriminations; or
 - (b) with customers of either of them.”

It is difficult to see how any price discrimination in favor of the State of Montana, made on bids after open competition, could substantially lessen competition or how it would tend to create a monopoly or injure, destroy or prevent competition. The State of Montana is not in competition with any person or corporation engaged in the sale of oils and greases and any advantage which the State might receive could not injure any competitor, since the State has no competitor. Moreover, the right of the Congress to restrict the State in its operation in this respect is seriously questioned. Until the validity of the Act shall be upheld by a decision of a competent court, it is my opinion, on the reasons herein stated, that you should continue to make purchases of such commodities at the lowest competitive prices and that you are not restricted in doing so by the said Act.