reserve has always been considered in banking institutions as the property of the institution above and beyond the capital stock and such remains the property of the institution until it is divided among the stockholders.


I think it is not the practice among banks to keep their surplus or reserve intact and in cash on hand but the same is treated as other assets are treated for the purposes of producing revenues.

It is my opinion, therefore, that the requirement that the reserve shall be held to meet contingencies means only that it shall not be distributed to members except upon dissolution of the corporation. It does not mean that the same shall be held as cash in hand.

HIGHWAY COMMISSION, STATE: Robinson-Patman Act, applicability of same to bids received by State Highway Commission.

May 24, 1937.

Hon. W. H. Skinner,
Purchasing Agent,
State Highway Commission,
State House,
Indianapolis, Indiana.

Dear Mr. Skinner:

I have before me your letter stating that on May 18, 1937, the State Highway Commission of Indiana received bids on 2,725,000 to 3,000,000 gallons of gasoline, having an octane rating of 69 or more, to be furnished over a period of twelve months.

You state that the above quantities are estimated only and that the successful bidder must furnish more or less during the twelve-month period as may be needed, and that gasoline requirements for all other state departments are to be obtained upon this contract in accordance with the award.

You state further that the bids were made upon the basis of a discount from the posted tank wagon market price (in-
cluding tax) in effect as posted at the seller's bulk plant from which delivery is made for the point of delivery.

You also state that all bidders, except two, quoted a discount of 1½ cents per gallon from the posted tank wagon market price (including tax) in effect as posted at the seller's bulk plant, and that the remaining two quoted a slightly larger discount per gallon, which would make their bids lower than the bids of all other bidders.

You ask to be advised whether the Commission can accept the low bid without violating the Robinson-Patman Act.

The Robinson-Patman Act is an Act of Congress entitled "AN ACT to amend section 2 of the Act entitled ‘An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,’ approved October 15, 1914, as amended (U. S. C., title 15, Sec. 13) and for other purposes.” So much of said Act as appears to be necessary in the consideration of your question reads as follows:

"That it 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 (1) SUBSTANTIALLY TO LESSEN COMPETITION OR (2) TEND TO CREATE A MONOPOLY IN ANY LINE OF COMMERCE, OR (3) 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;" * * * (Our italics and capitals.)

U. S. C., title 15, Sec. 13, 1936, Cumulative Annual Pocket Part.

NOTE: The arabic numerals are added.

Subdivision (f) of the amended section 2 perhaps also ought to be quoted. It is as follows:
“That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.” (Our italics.)

The conclusion to which I have come, however, seems to me to render this latter provision of no particular importance as applied to the State of Indiana. I will say in passing, however, that, in my opinion, the mere fact that one company bids at a price somewhat lower than the price bid by another company does not of itself evidence a discrimination such as is referred to in this Act. The discriminations, insofar as they affect the matter under investigation, consist in discriminations in price to different purchasers of commodities of like grade and quality from the same seller. In other words, the fact of discrimination, or lack of discrimination, as applied to the situation under consideration, is obtained by the comparison of the price to the State and the price to other customers of the same bidder for the same grade and quality of materials and in substantially the same quantities.

As to whether the low bidder in this case is proposing to sell the State its product for a less sum than its price to other customers buying in substantially the same quantities does not appear from the evidence submitted. The fact that the proposals of other bidders are higher than that of the low bidder does not necessarily indicate anything with reference to discriminations upon the part of the low bidder between the State and its other customers.

Apparently also the question is not involved here of discrimination by selling in one part of the United States at a lower price than the price exacted by such person elsewhere in the United States for the purpose of destroying competition or eliminating a competitor in such part of the United States, nor is the question involved here of selling at unnecessarily low price for the purpose of destroying competition or eliminating a competitor.

I think, therefore, that the question which I am to determine upon the basis of the information furnished me, resolves itself into a consideration only of the language of the Act first above quoted. From such consideration I have concluded that not all discriminations in price are made unlawful by said language, but that only such discriminations are unlawful as have the effect or may have the effect of substantially lesseni-
ing competition or tending to create monopoly or injuring, destroying or preventing competition.

After stating that "it 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," the Act proceeds to attach certain limiting clauses introduced by the word "where." The first of these clauses limits the application of the language just quoted to cases where the purchases involved in such discrimination are in commerce; the second limits them to such commodities as 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. The last of these limiting clauses is as follows: "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."

The gasoline which you are proposing to buy is bought for consumption by the State. There is no resale by the State by which competition between the State of Indiana and other customers of the successful bidder can be brought about and it is difficult, therefore, to see how the seller could be deemed to have violated this Act even if it be admitted that a special price is given to the State.

I know of no decisions upon this question and I am, therefore, obliged to consider the matter as a matter of first impression.

It seems to me, however, that the Act fundamentally is aimed at such discriminations as substantially lessen competition or tend to create monopoly, and I do not see how the acceptance of the low bid by the State in this case, in view of the fact that the State is not in competition with any other customer of the seller, can either lessen competition or tend to create a monopoly.

I think, therefore, upon the evidence furnished me, that there is nothing in the Robinson-Patman Act which prevents the acceptance of the low bid in the case referred to in your letter.