

21
19

November 2019

STRICTLY CONFIDENTIAL

[REDACTED]
MTR Corporation (Sydney) SMCSW Pty Limited
c/o MTR Corporation Limited
MTR Headquarters Building Telford Plaza
Kowloon Bay, Hong Kong

Dear [REDACTED]

Sydney Metro City & Southwest – Variation to the OTS2 Early Works Deed

We refer to:

- (a) the deed titled "OTS2 Early Works Deed" entered into between Sydney Metro (ABN 12 354 063 515) (**Sydney Metro**) and MTR Corporation (Sydney) SMCSW Pty Limited (ACN 615 158 122) (**MTR**) dated 7 December 2018 (**Early Works Deed**); and
- (b) the letter titled "Sydney Metro City & Southwest – OTS2 Early Works Deed" between Sydney Metro and MTR dated 27 September 2019 (**Continuation of Early Works Letter**).

In order to provide greater certainty that the program objectives for the works to be performed under the proposed OTS2 Project Deed will be met, Sydney Metro entered into the Continuation of Early Works Letter with MTR and each Significant Contractor EWD with the Nominated Subcontractors. Sydney Metro and MTR have agreed to enter into this letter to record their intention to novate of each of the Significant Contractor EWDs from Sydney Metro to MTR and to regulate the treatment of the works performed under the Continuation of Early Works Letter and each Significant Contractor EWD and payments associated with such works.

This letter has been executed by both parties as a deed.

Sydney Metro and MTR agree as follows:

1. Definitions and interpretation

- (a) The following definitions apply in this letter.

Checkpoint Milestones (SM) has the meaning given in each Significant Contractor EWD.

Interim Early Works has the meaning given to that term in the Continuation of Early Works Letter.

Interim Milestones has the meaning given to that term in the Continuation of Early Works Letter.

Significant Contractor EWD has the meaning given to that term in the Continuation of Early Works Letter.

SM Early Works has the meaning given to that term in each Significant Contractor EWD.

SOP Act means the *Building and Construction Industry Security of Payment Act 1999* (NSW).

- (b) Capitalised terms used but not otherwise defined in this letter will have the meaning given to them in the Early Works Deed.
- (c) Clause 1.3 of the Early Works Deed will apply in interpreting this document.

2. **Novation of Continuation of Early Works Letters**

The parties acknowledge that they intend as follows:

- (a) each of the Significant Contractor EWDs are to be novated from Sydney Metro to MTR pursuant to clause 8(a) of the relevant Significant Contractor EWDs; and
- (b) Sydney Metro, MTR and each Nominated Subcontractor will enter into a deed of novation and variation on or about the date of this letter to effect the novation of the SM Early Works from Sydney Metro to MTR and the incorporation of such work within the relevant Nominated Subcontract.

It is a condition precedent to clauses 3 and 5 of this letter that Sydney Metro, MTR and each Nominated Subcontractor have entered into each deed of novation described in clause 2(b).

3. **Amendment to Early Works Deed**

- (a) The Early Works Deed is amended with effect on and from the date of this letter as set out in Schedule 1 (*Early Works Deed Amendments*).
- (b) Paragraph (a) does not affect any right or obligation of either party that arises before the date of this letter.
- (c) Except as expressly amended by this letter, no changes to the Early Works Deed are to be inferred or implied, and in all other respects the Early Works Deed is confirmed and remains in full force and effect.

4. **MTR Parent Company Guarantee**

Contemporaneously with the execution of this letter, MTR must provide a letter from [REDACTED] to Sydney Metro, in form and substance satisfactory to Sydney Metro, acknowledging and confirming that:

- (a) the amendments to the Early Works Deed under clause 2 form part of the obligations to which the MTR Parent Company Guarantee applies; and
- (b) the MTR Parent Company Guarantee applies to the:

- (i) Early Works;
- (ii) Interim Early Works; and
- (i) SM Early Works.

5. Payment for Interim Early Works and SM Early Works

- (a) The parties acknowledge and confirm that as at the date of this letter Sydney Metro has paid MTR the amounts set out in section 1 of Schedule 2 (*Payment for Interim Early Works*) in respect of the Interim Early Works for the corresponding Interim Milestones.
- (b) The parties acknowledge and confirm that:
 - (i) as at the date of this letter the Checkpoint Milestones (SM) set out in Schedule 3 (*Checkpoint Milestones (SM) achieved and certified*) have been achieved and payment schedules certified by Sydney Metro for such Checkpoint Milestone (SM); and
 - (ii) Sydney Metro has paid or will pay the Nominated Subcontractors the amounts set out in Schedule 3 (*Checkpoint Milestones (SM) achieved and certified*) in respect of the SM Early Works for those completed Checkpoint Milestones (SM) under and in accordance with the relevant Significant Contractor EWD.

Sydney Metro agrees to provide reasonable evidence of such payments to MTR after reasonable request from MTR.

- (c) The parties acknowledge and confirm that:
 - (i) as at the date of this letter the Checkpoint Milestones (SM) set out in Schedule 4 (*Checkpoint Milestones (SM) achieved but not certified*) have been achieved but Sydney Metro has not certified payment schedules for such Checkpoint Milestone (SM); and
 - (ii) Sydney Metro has or will pay MTR the amounts set out in Schedule 4 (*Checkpoint Milestones (SM) achieved but not certified*) in respect of the SM Early Works for those completed Checkpoint Milestones (SM) under the Early Works Deed (as amended by this letter), which MTR will pay to each Nominated Subcontractor under the relevant Nominated Subcontract (as amended by the deed of novation and variation).
- (d) The parties acknowledge and confirm that:
 - (i) the Checkpoint Milestones (SM) set out in Schedule 5 (*Outstanding Checkpoint Milestones (SM)*) have not been achieved by the relevant Nominated Subcontractor as at the date of this letter; and
 - (ii) Sydney Metro must pay any outstanding amounts from Schedule 5 (*Outstanding Checkpoint Milestones (SM)*) to MTR under the Early Works Deed (as amended by this letter), which MTR will pay to each Nominated

Subcontractor under the relevant Nominated Subcontract (as amended by the deed of novation and variation) following achievement and certification of the relevant Checkpoint Milestone (SM) in accordance with clause 5, clause 9 and Schedule 5 of the Early Works Deed (as amended by this letter).

6. Assistance with SOP Act claims

In the event that a SOP Act claim is made against Sydney Metro for payment of any Checkpoint Milestone (SM) set out in Schedule 4 of this deed as a result of Sydney Metro having received a payment claim in respect of any such Checkpoint Milestone (SM), MTR agrees that it will provide all assistance and documentation reasonably requested by Sydney Metro in order to enable Sydney Metro to take all actions in relation to the claim.

7. Giving effect to this document

Each party must do anything (including execute any document), and must ensure that its employees and agents do anything (including execute any document), that the other party may reasonably require to give full effect to this document.

8. Notices

- (a) Wherever referred to in this clause, Notice means each communication (including each notice, consent, approval, request and demand) under or in connection with this letter.
- (b) Each Notice must:
 - (i) be in writing;
 - (ii) be addressed:
 - (A) in the case of a Notice from the Principal, to [REDACTED] or
 - (B) in the case of a Notice from MTR, to the Principal's Representative (any Notice in relation to a Claim or a Dispute must also be addressed to the General Counsel - Sydney Metro and sent to [REDACTED])
 - (iii) be signed by the party making it or (on that party's behalf) by the solicitor for, or any attorney, director, secretary or authorised agent of, that party; and
 - (iv) be delivered or posted to the relevant address shown below (or to any new address notified by the intended recipient):

Principal

Name: Sydney Metro, a New South Wales Government agency

Address: Level 43, 680 George Street, Sydney NSW 2000

For the attention of: Principal's Representative

MTR

Name: MTR Corporation (Sydney) SMCSW Pty Limited

Address: c/o MTR Corporation Limited, MTR Headquarters Building Telford Plaza, Kowloon Bay, Hong Kong

For the attention of: MTR's Representative

- (c) A communication is taken to be received by the addressee:
- (i) (in the case of prepaid post sent to an address in the same country) 2 Business Days after the date of posting;
 - (ii) (in the case of international post) 7 Business Days after the date of posting;
 - (iii) (in the case of delivery by hand) on delivery;
 - (iv) (in the case of an email) if it is transmitted:
 - (A) by 5.00pm (Sydney time) on a Business Day – on that Business Day; or
 - (B) after 5.00pm (Sydney time) on a Business Day, or on a day that is not a Business Day – on the next Business Day; and
 - (v) (in the case of fax) at the time in the place to which it is sent equivalent to the time shown on the transmission confirmation report produced by the fax machine from which it was sent,

provided that if the communication would be deemed to be received on a day which is not a Business Day or after 5.00pm on a Business Day, it is deemed to be received at 9.00am on the next Business Day.

9. Amendment

This document can only be amended or replaced by another document signed by the parties.



10. Counterparts

This document may be executed in counterparts.

11. Governing Law

This letter is governed by the laws of New South Wales.

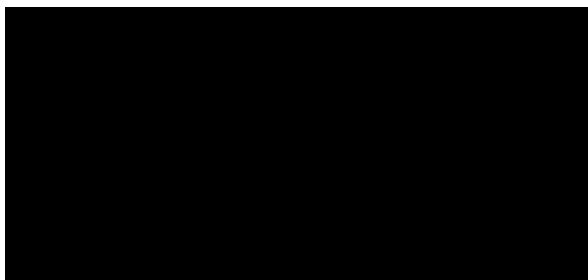
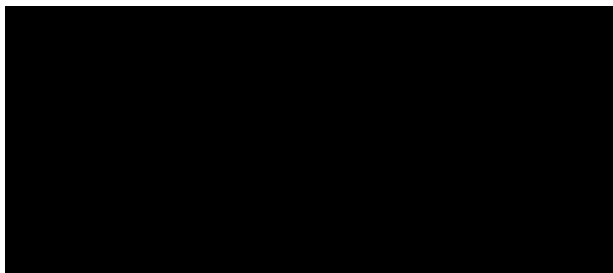
Yours sincerely,

For and on behalf of **SYDNEY METRO**

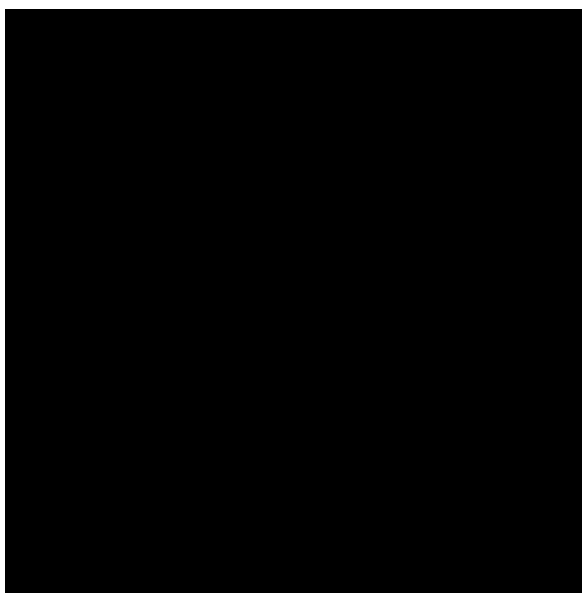
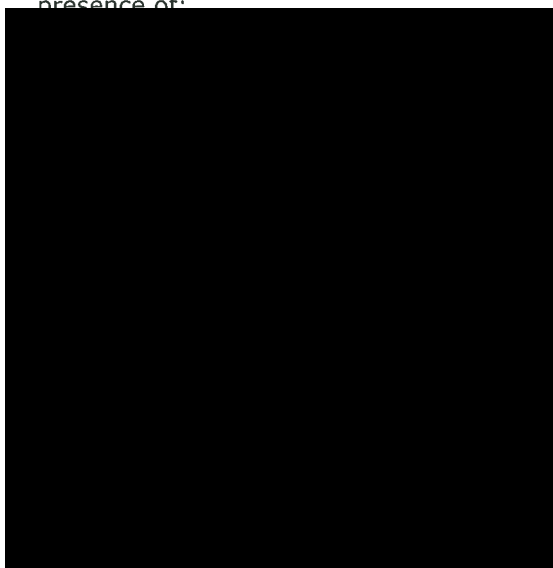


Executed and delivered as a deed.

EXECUTED by **SYDNEY METRO ABN 12 354 063 515** by its duly authorised delegate, in the presence of:



SIGNED, SEALED and **DELIVERED** for **MTR CORPORATION (SYDNEY) SMCSW PTY LIMITED** by its attorney under power of attorney in the presence of:



SCHEDULE 1

Early Works Deed Amendments

The Early Works Deed is amended with effect on and from the date of this letter as set out below:

1. Clause 1.1 (*Definitions*):

- (a) A new definition of "Continuation of Early Works Letter" is inserted as follows:

Continuation of Early Works Letter means the letter between Sydney Metro and MTR dated 27 September 2019.

- (b) The definition of "Early Works Activities" is amended as follows:

Early Works Activities means:

(a) all activities that MTR performs, or is required to perform, to exercise its rights or comply with its obligations under this deed, whether or not the performance of such things or tasks is subcontracted to a MTR Contractor;

(b) Interim Early Works Activities performed or required to be performed by MTR under the Continuation of Early Works Letter; and

(c) SM Early Works Activities performed or were required to be performed by the Nominated Subcontractors under the Significant Contractor EWDs.

- (c) A new definition of "Interim Early Works" is inserted as follows:

Interim Early Works has the meaning given in the Continuation of Early Works Letter.

- (d) A new definition of "Interim Early Works Activities" is inserted as follows:

Interim Early Works Activities has the meaning given in the Continuation of Early Works Letter.

- (e) A new definition of "SM Early Works Payment" is inserted as follows:

SM Early Works Payment has the meaning given in the relevant Significant Contractor EWD.

- (f) A new definition "Significant Contractor EWD" is inserted as follows:

Significant Contractor EWD means each of the following:

- (a) the letter between Sydney Metro and Alstom Transport Australia Pty Limited (ACN 165 157 451) dated 28 August 2019;
- (b) the letter between Sydney Metro and UGL Engineering Pty Ltd (ACN 096 365 972) dated 13 September 2019;
- (c) the letter between Sydney Metro and Thales Australia Limited (ABN 66 008 642 751) dated 28 August 2019; and
- (d) the letter between Sydney Metro and Gilgen Door Systems AG (CH-ID: 0353007678D; UID: CHE-105-981.157) dated 28 August 2019.

(g) A new definition of "SM Early Works" is inserted as follows:

SM Early Works has the meaning given in each Significant Contractor EWD.

2. Clause 3.2(a) is amended as follows:

(a) The parties acknowledge and agree that, if the Draft OTS2 Project Deed is executed by the Principal and OpCo2 and Financial Close occurs under the Executed OTS2 Project Deed, the:

- (i) Interim Early Works performed or required to be performed by MTR under the Continuation of Early Works Letter;
- (ii) SM Early Works performed or required to be performed by the Nominated Subcontractors under the Significant Contractor EWDs; and
- (ii) Early Works performed or required to be performed by MTR pursuant to this deed;

will on and from the date of Financial Close:

(iv)(iii) form part of the OTS2 Works under the Executed OTS2 Project Deed and be deemed to have been performed by or on behalf of OpCo2 under the Executed OTS2 Project Deed; and

(v)(iii) form part of the OTS2 Works (as defined in the Integrator Deed) under the Integrator Deed and be deemed to have been performed by or on behalf of the Integrator under the Integrator Deed,

and the parties agree that:

(vi)(iii) OpCo2 will owe liabilities and obligations to the Principal in respect of the Early Works under the Executed OTS2 Project Deed; and

(vii)(iv) MTR will owe liabilities and obligations to OpCo2 in respect of the Early Works under the Integrator Deed,

notwithstanding that the Interim Early Works, SM Early Works and Early Works will have been performed by or were required to be performed by or on behalf of MTR

or the Nominated Subcontractors (as applicable) and any acts or omissions in respect of the Interim Early Works, SM Early Works and Early Works performed will have occurred prior to the date of Financial Close under the Executed OTS2 Project Deed.

3. Clause 4 is amended as follows:

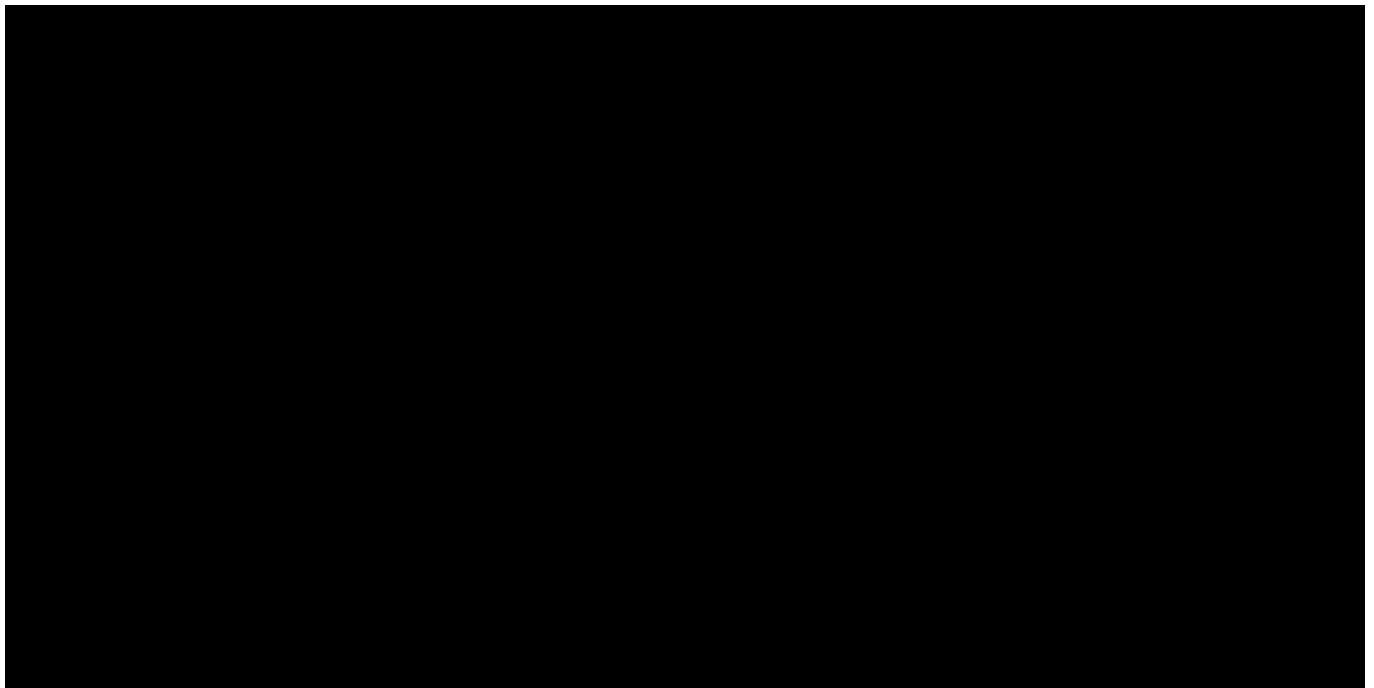
(c) The parties agree that subject to the other provisions of this deed, MTR will be entitled to and the Principal will be liable for payment of the Early Works Payments in accordance with this deed notwithstanding termination of this deed in accordance with clause 4(a)(i).

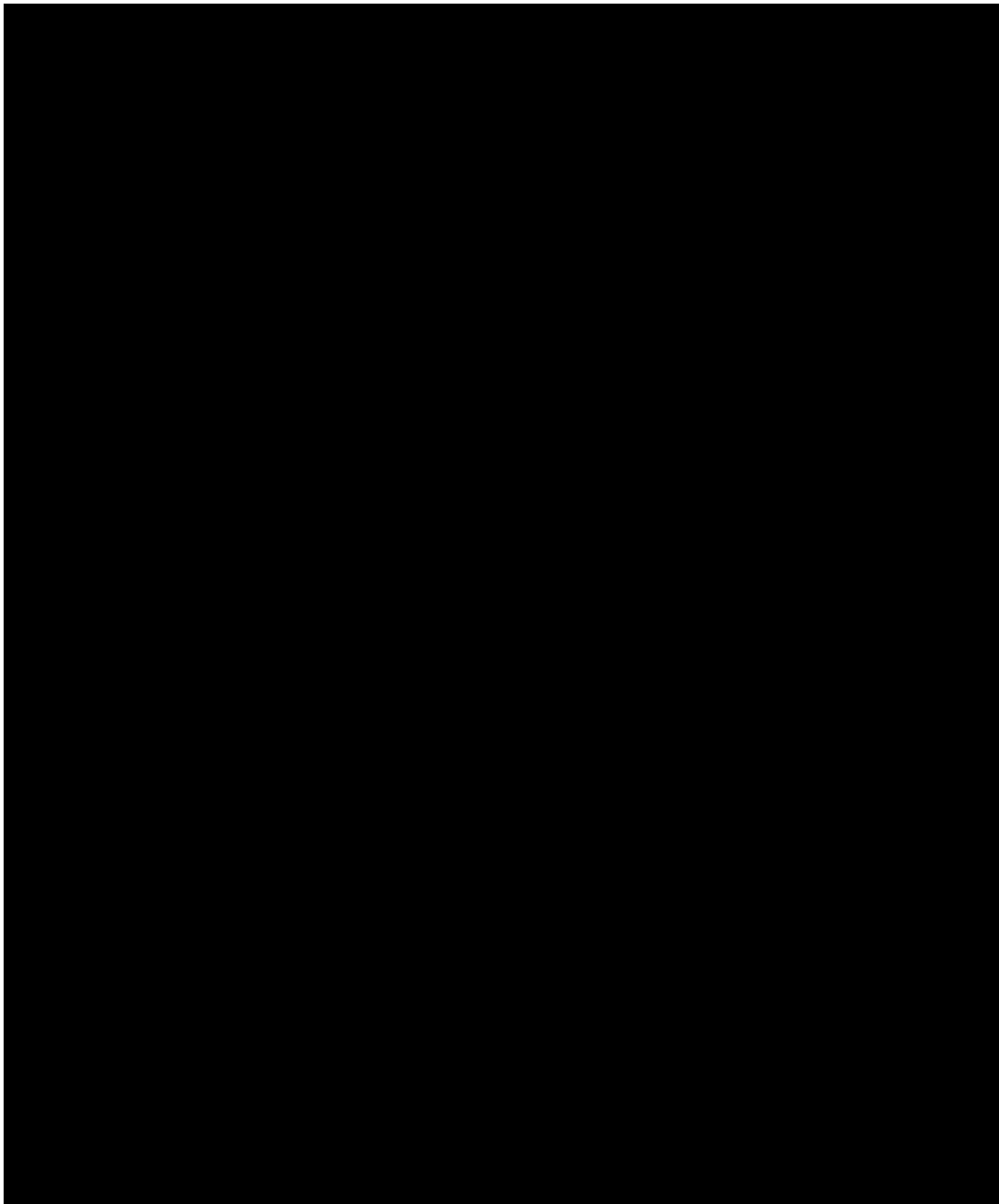
4. Clause 17.2 is amended as follows:

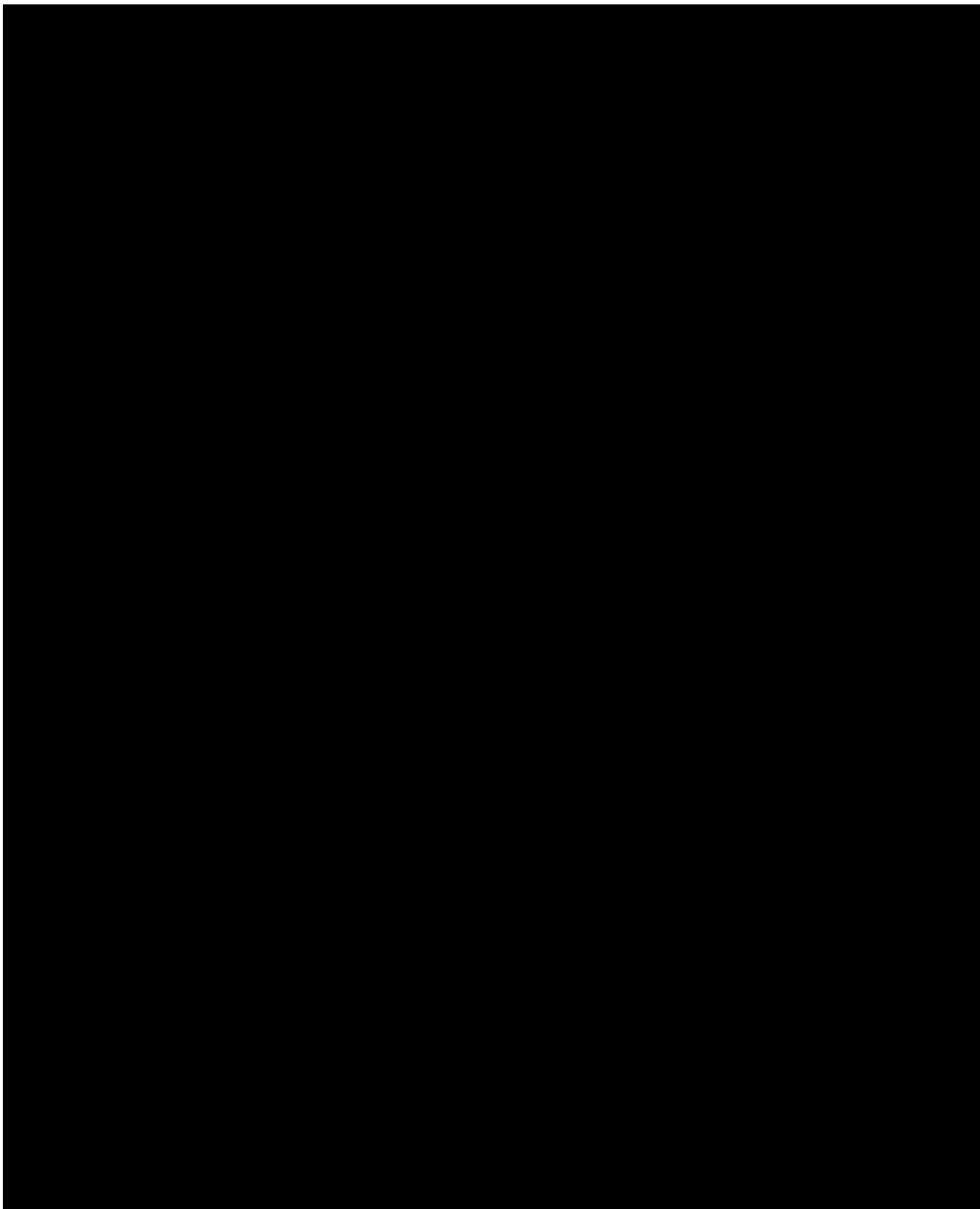
17.2 Survival of certain provisions; no merger

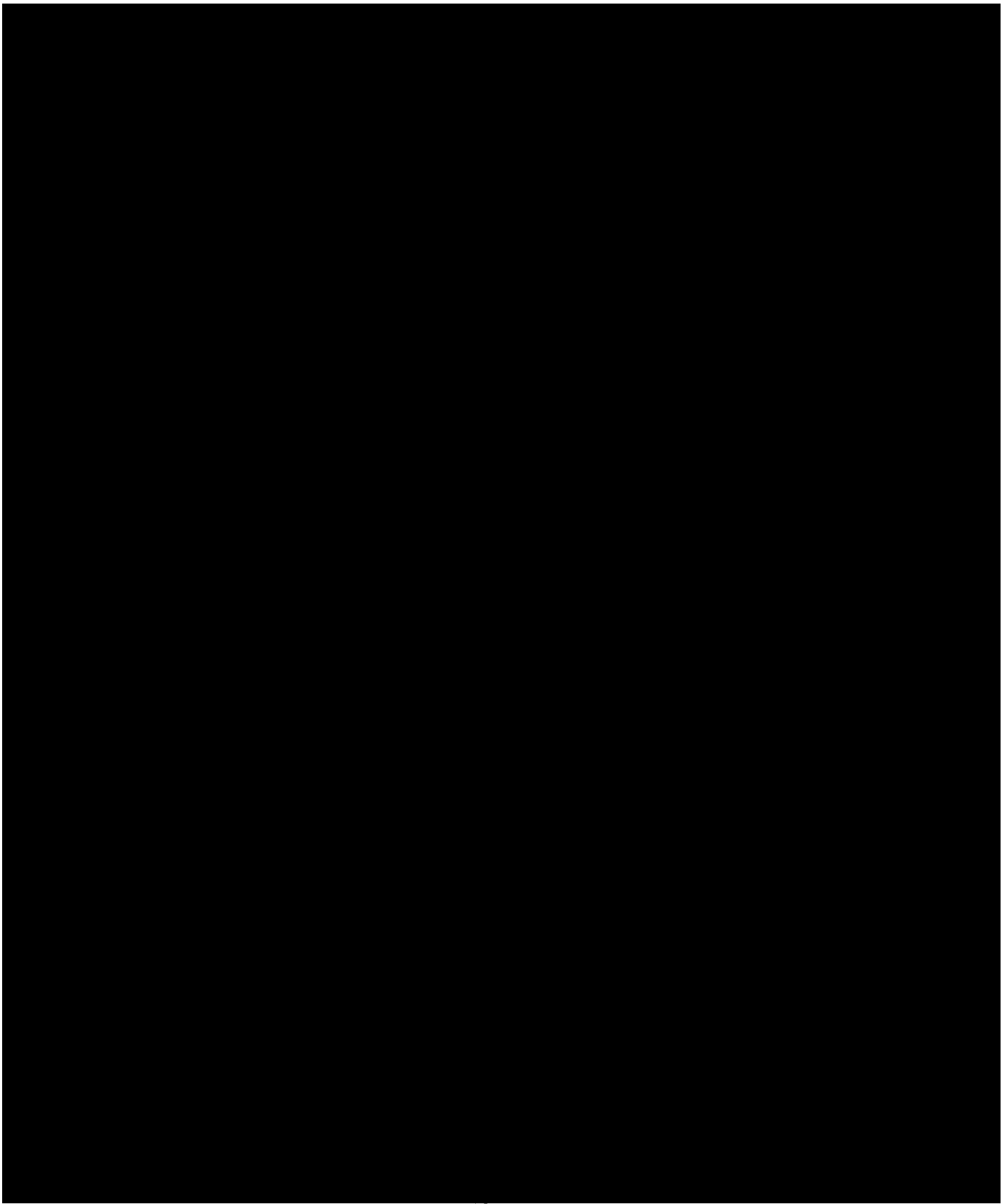
(a) Clauses 1 (Interpretation), 3.3 (Incorporation by reference), 4 (Term), 9 (Early Works Payments), 10 (Liability and Indemnity), 11 (MTR Parent Company Guarantee and Legal Opinion), 12 (Assignment and Subcontracting), 14.6 (Consequences of termination), 14.6 (Early Works Termination Payments), 16 (Notices), 17 (General), the Dispute Resolution Mechanism, clauses 11.2 (Information Documents), 25.11 (Set Off), 45.1 (Records), 47 (Disclosure, Confidentiality and Publicity), 48 (Intellectual Property) and Schedule 34 (Intellectual Property), 57 (Notice of Claims), 60 (Proportionate Liability), 61 (Taxes), ~~and~~ the relevant parts of clause 62 referenced in Schedule 1 (Draft OTS2 Project Deed clauses incorporated by reference), Schedule 5 (Early Works Payments), the representations, warranties and indemnities given by MTR under this deed and any other provisions which are expressed to survive termination (together, the Surviving Clauses) will survive rescission, termination or expiration of this deed.

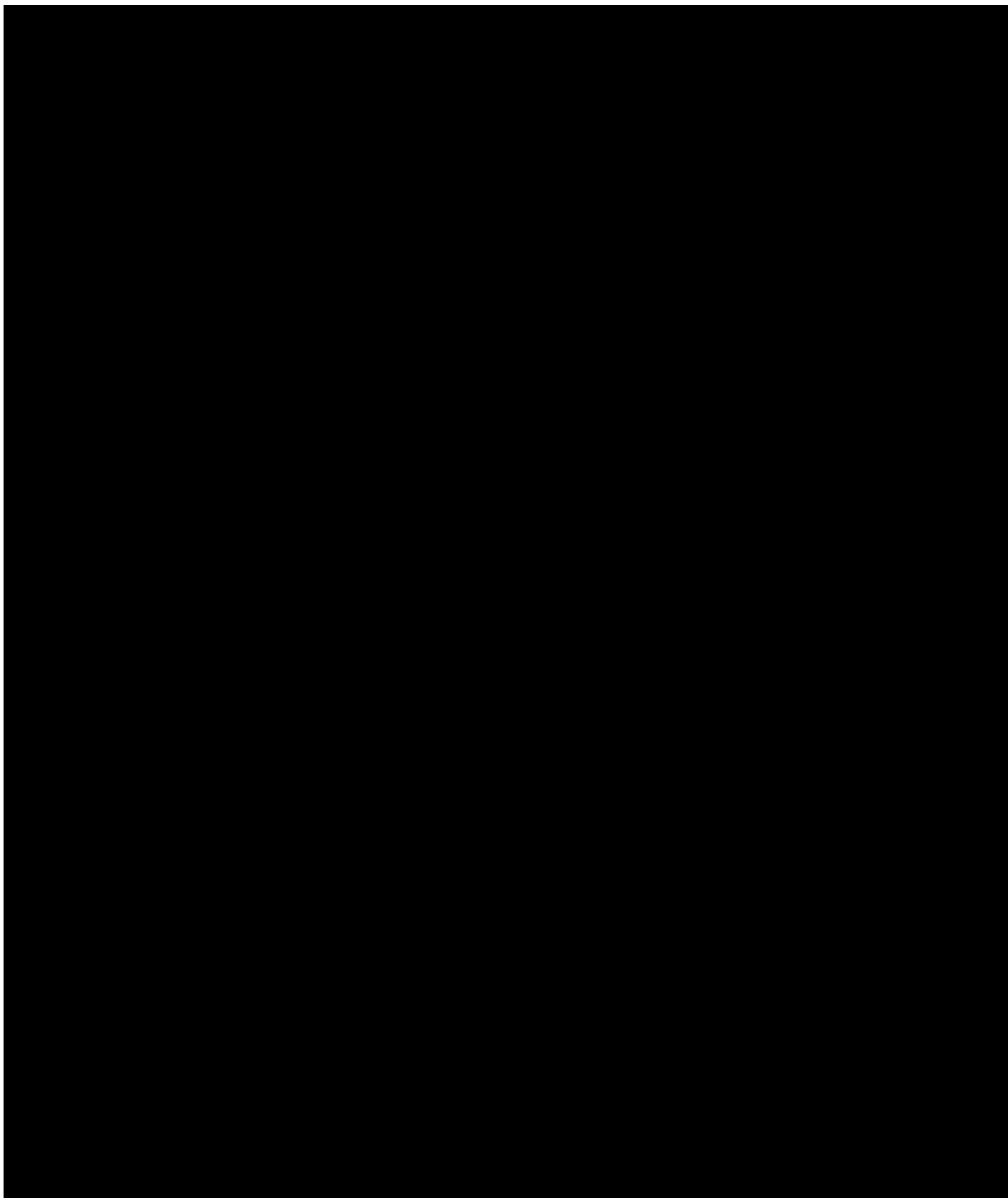
5. Schedule 2 (*Scope of Early Works*) is amended as set out below:

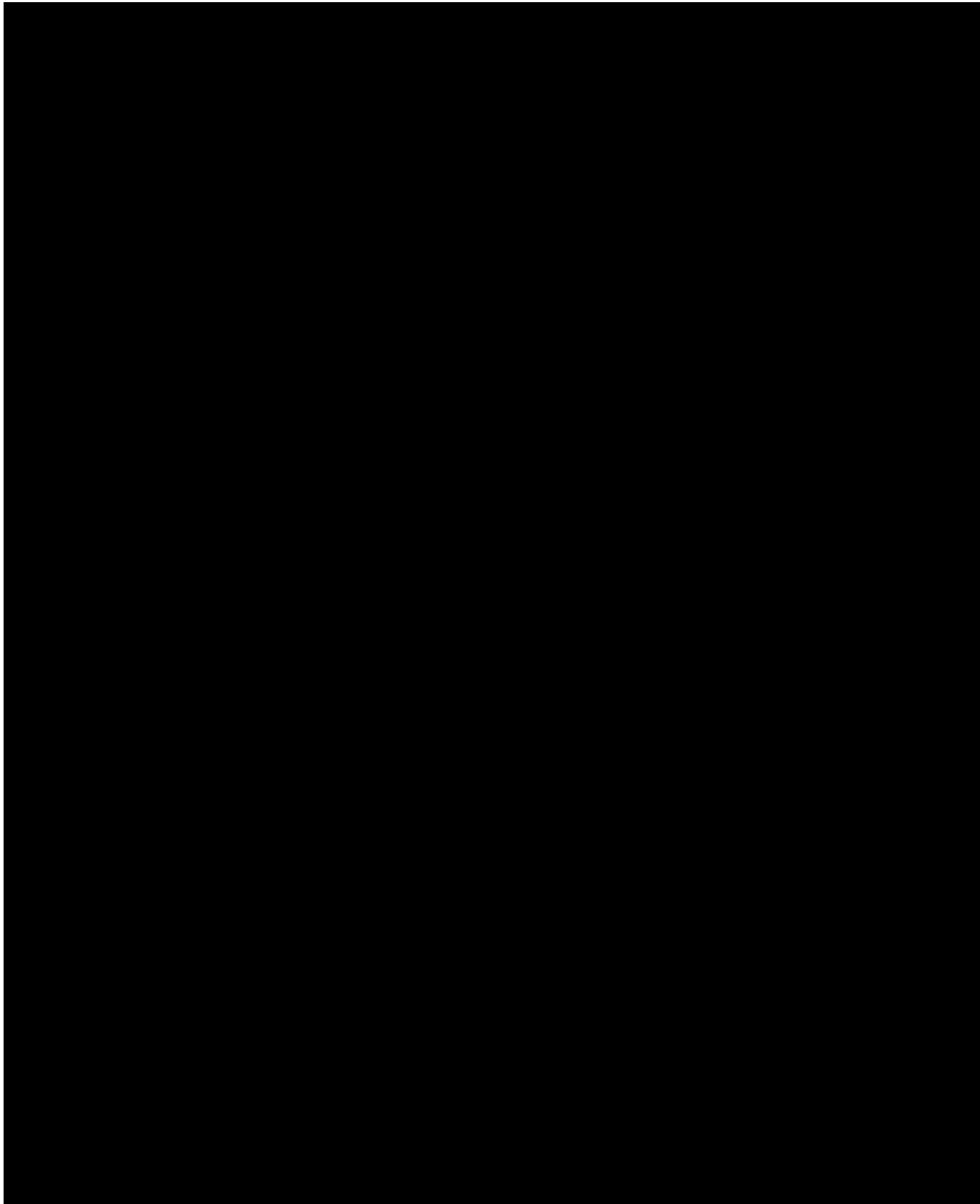


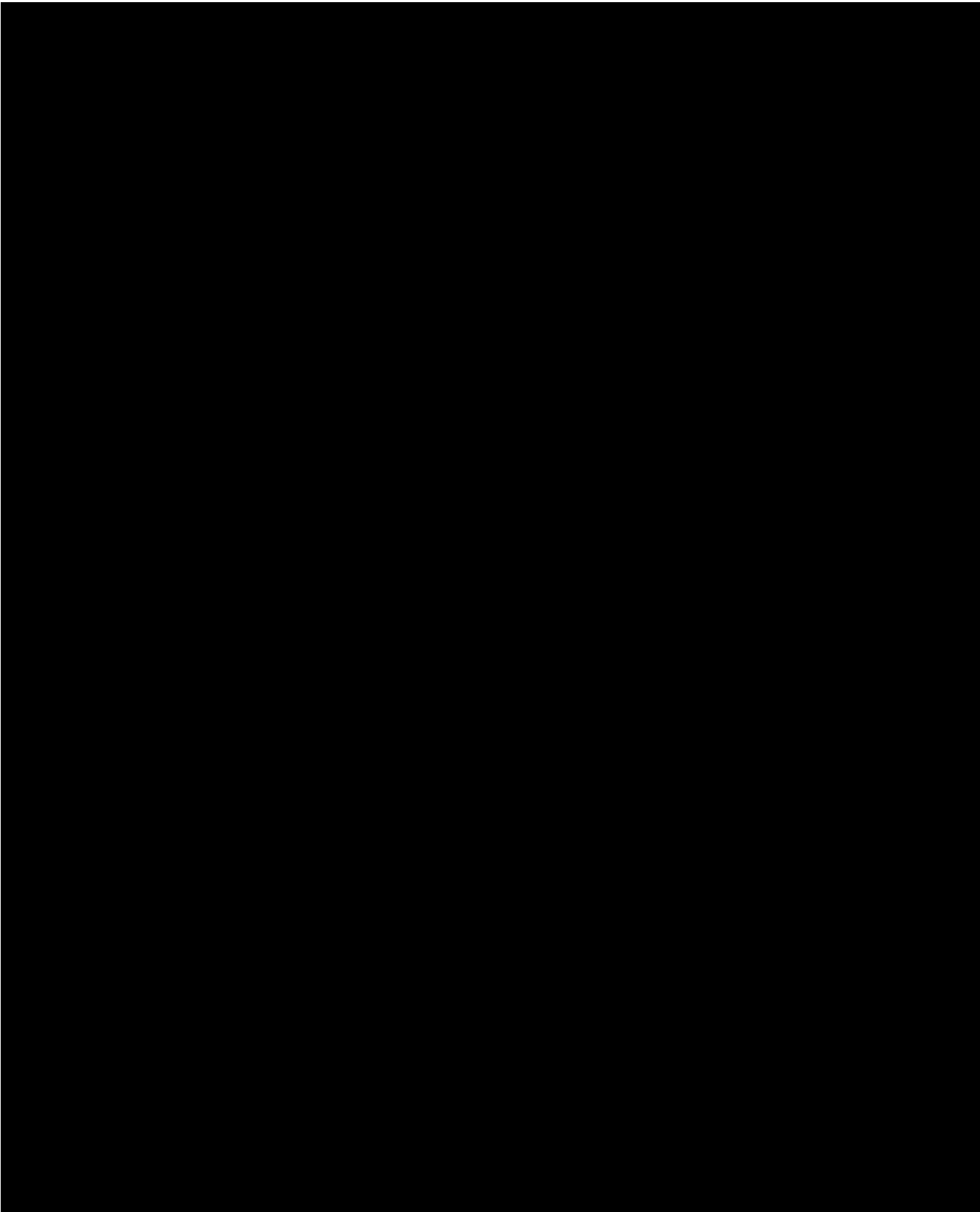


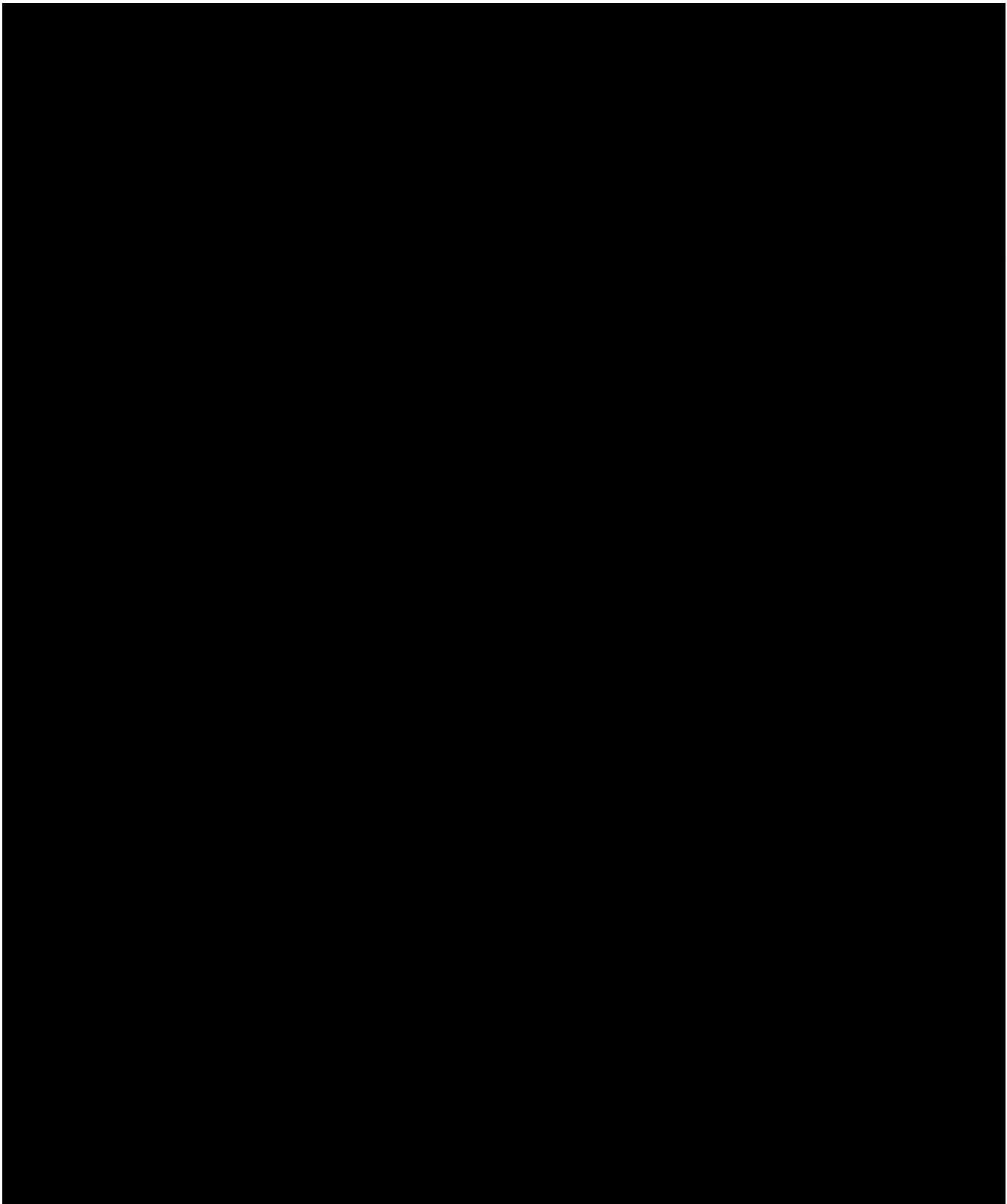


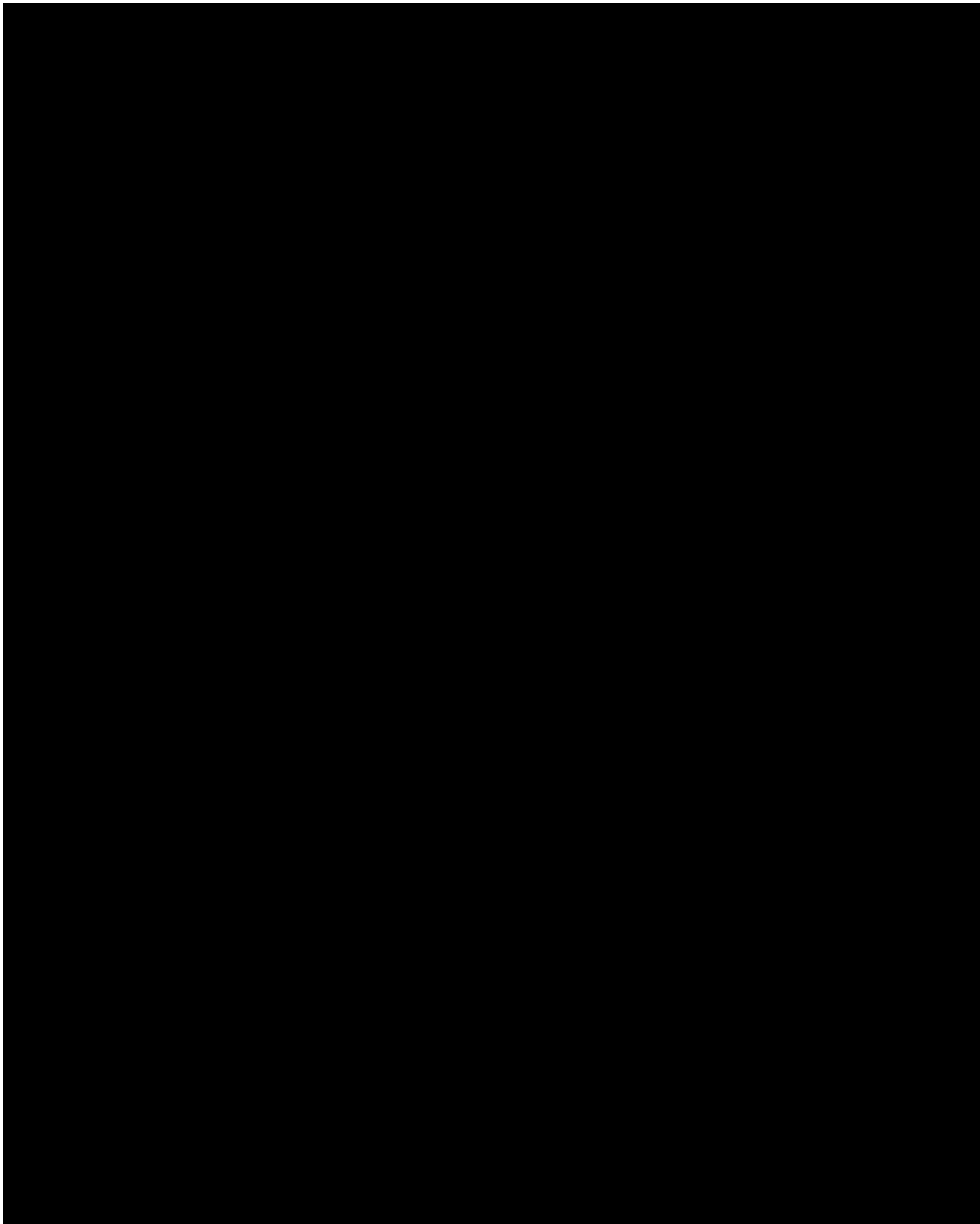


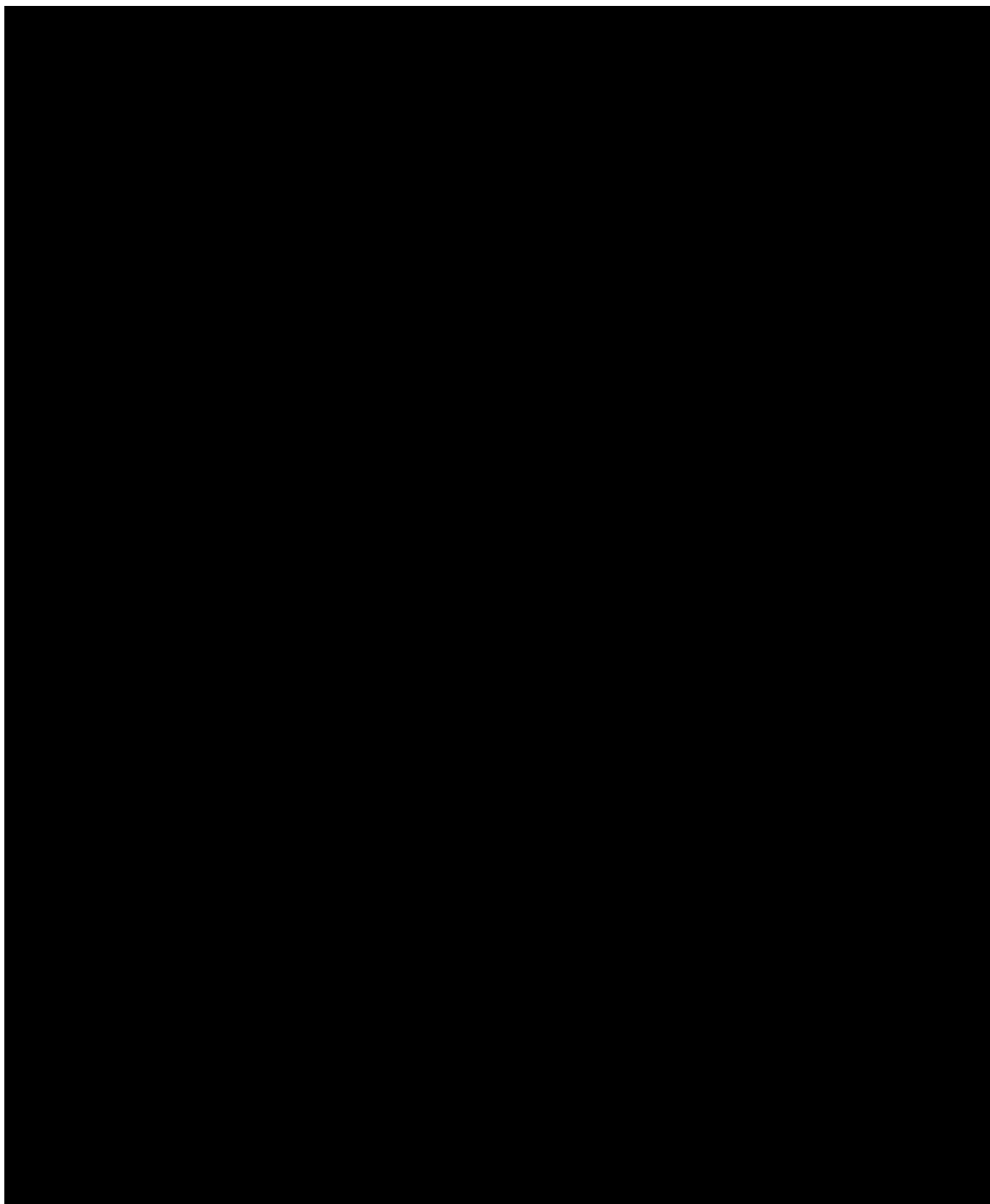


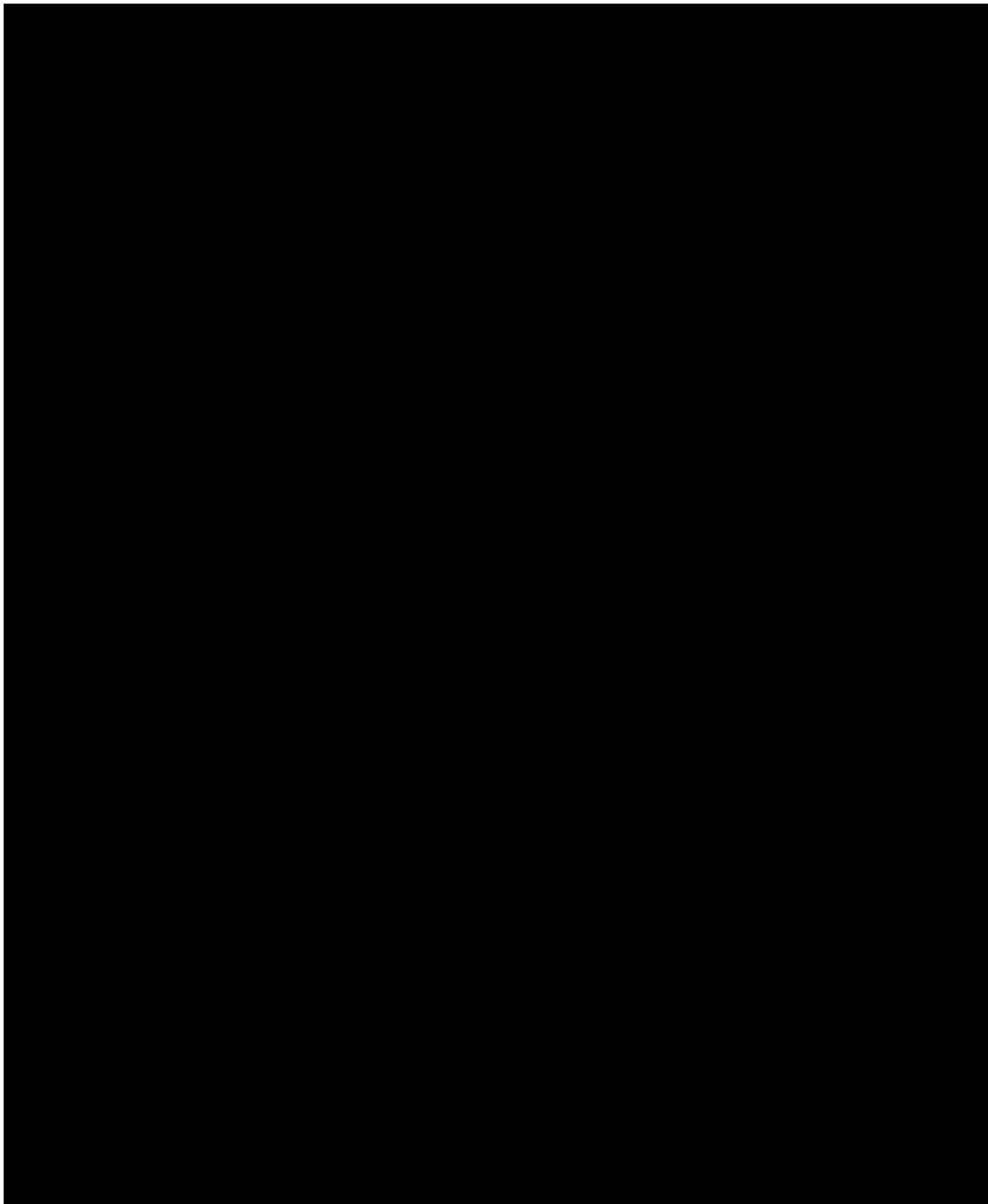




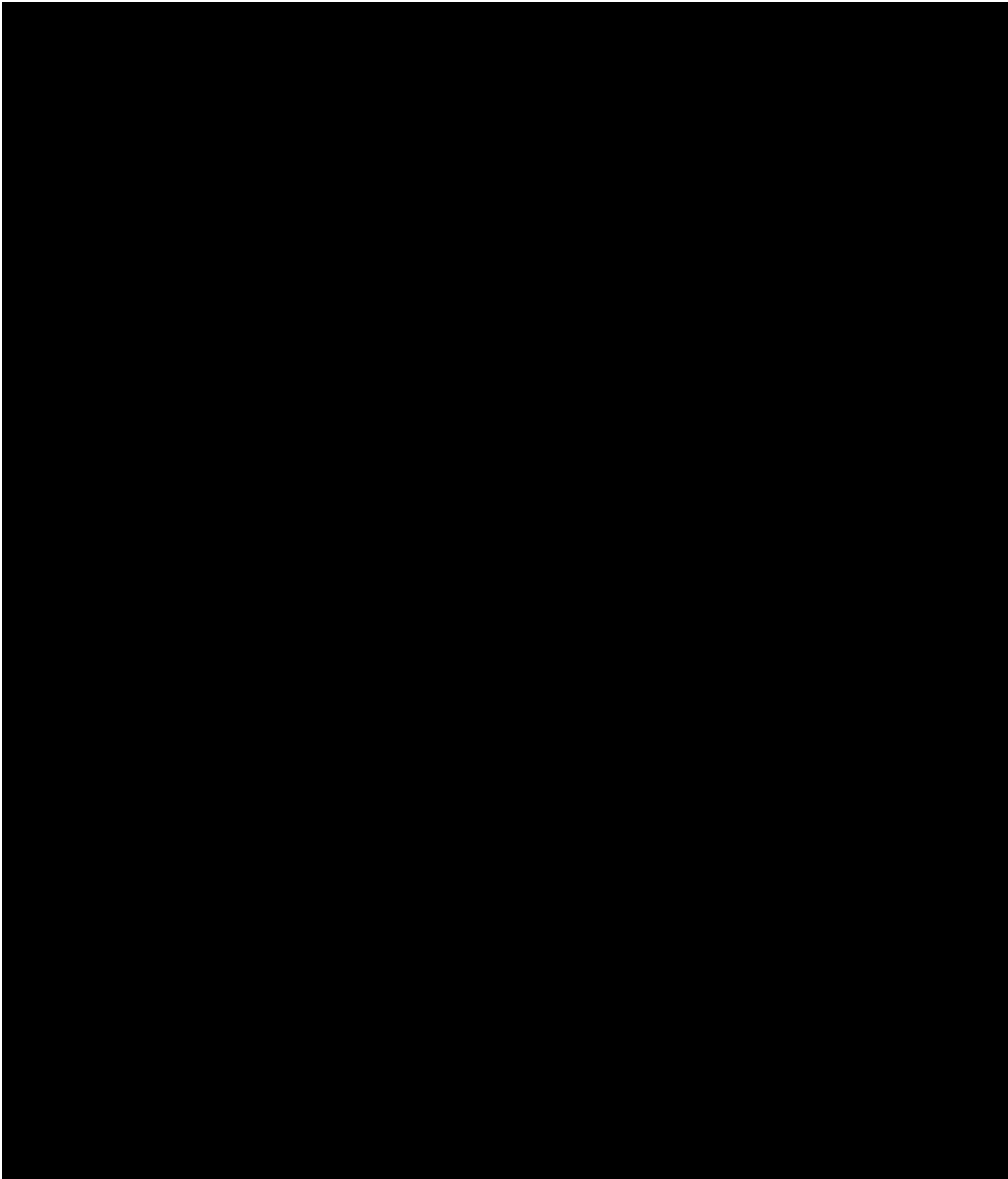




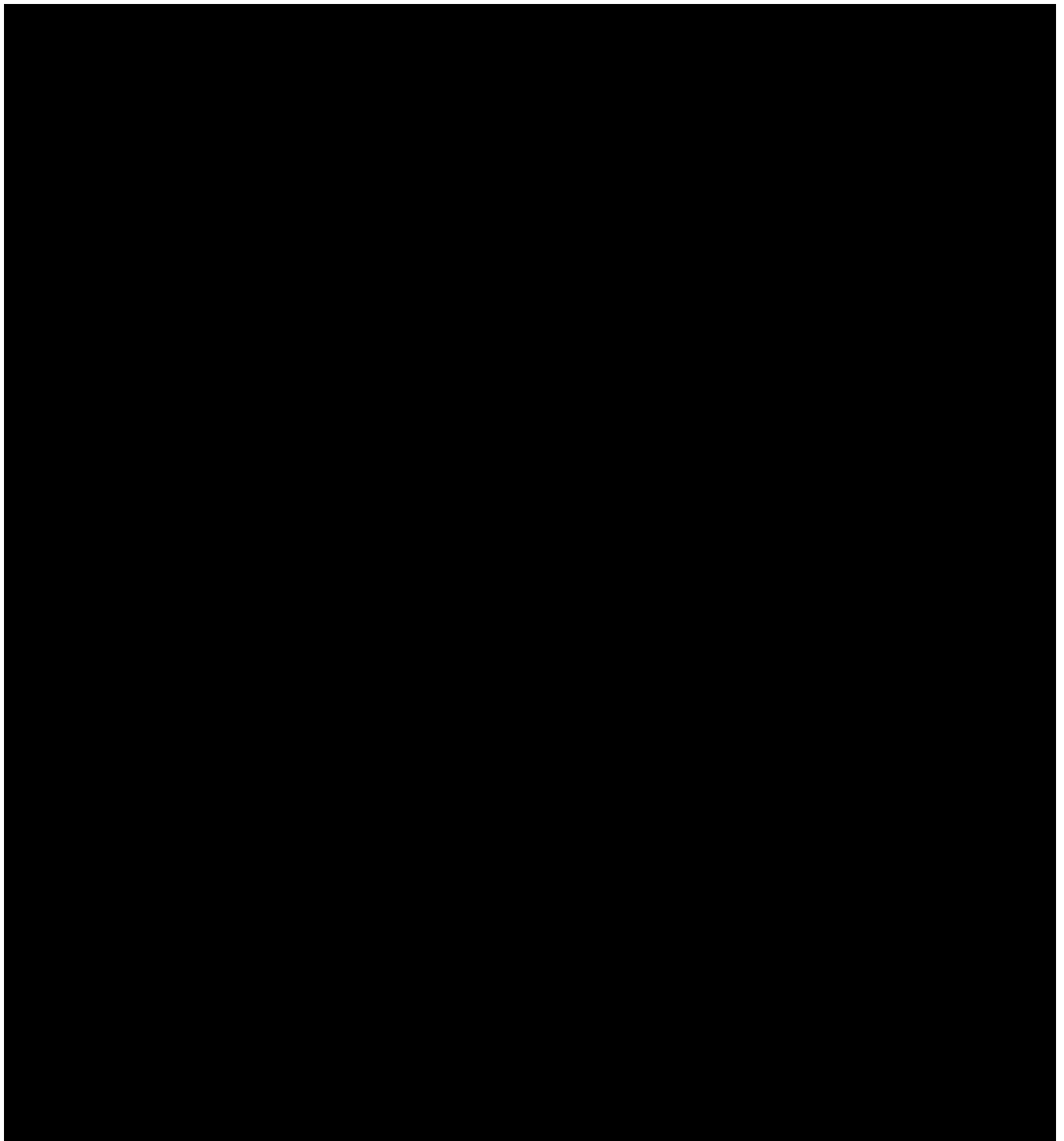






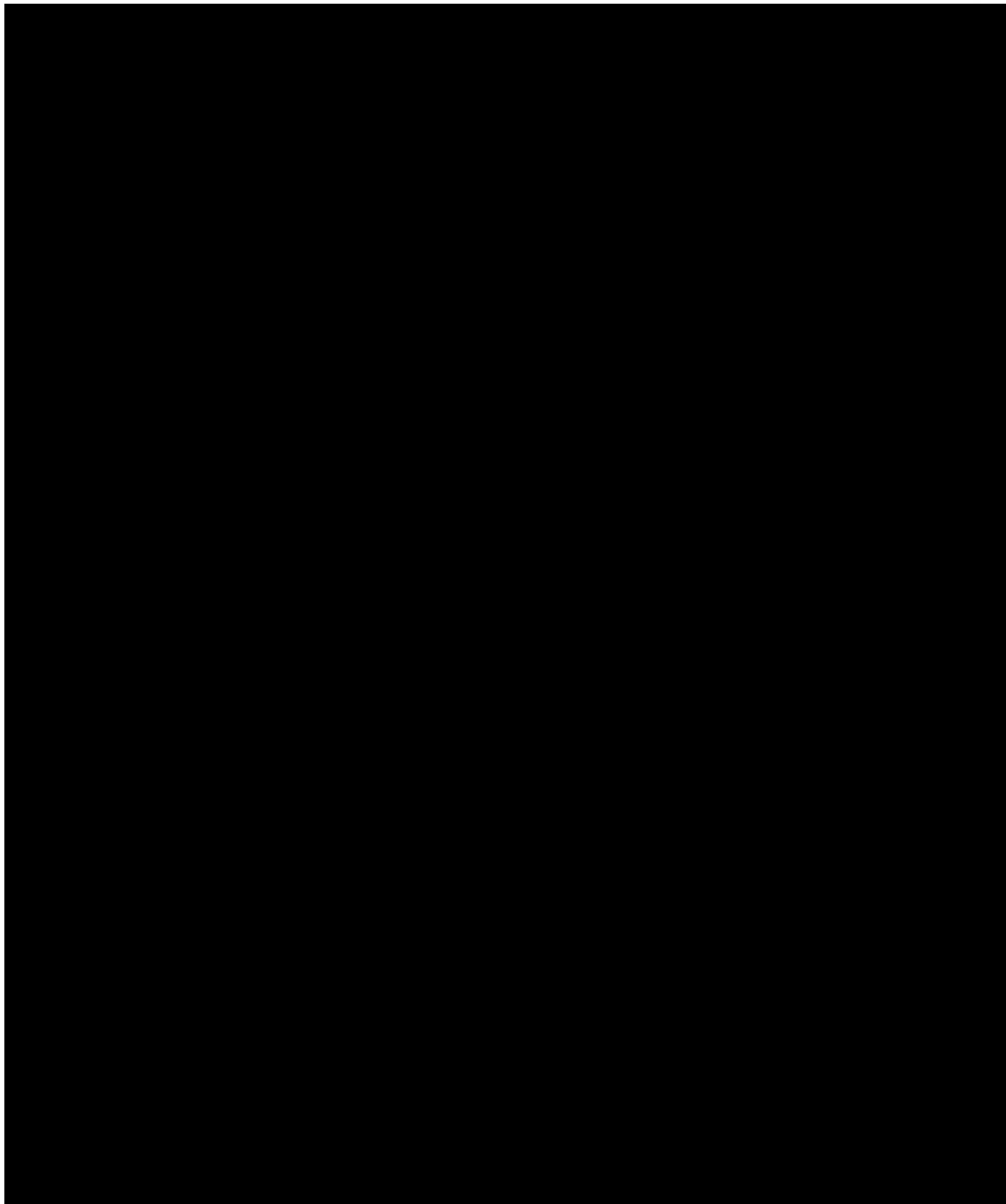


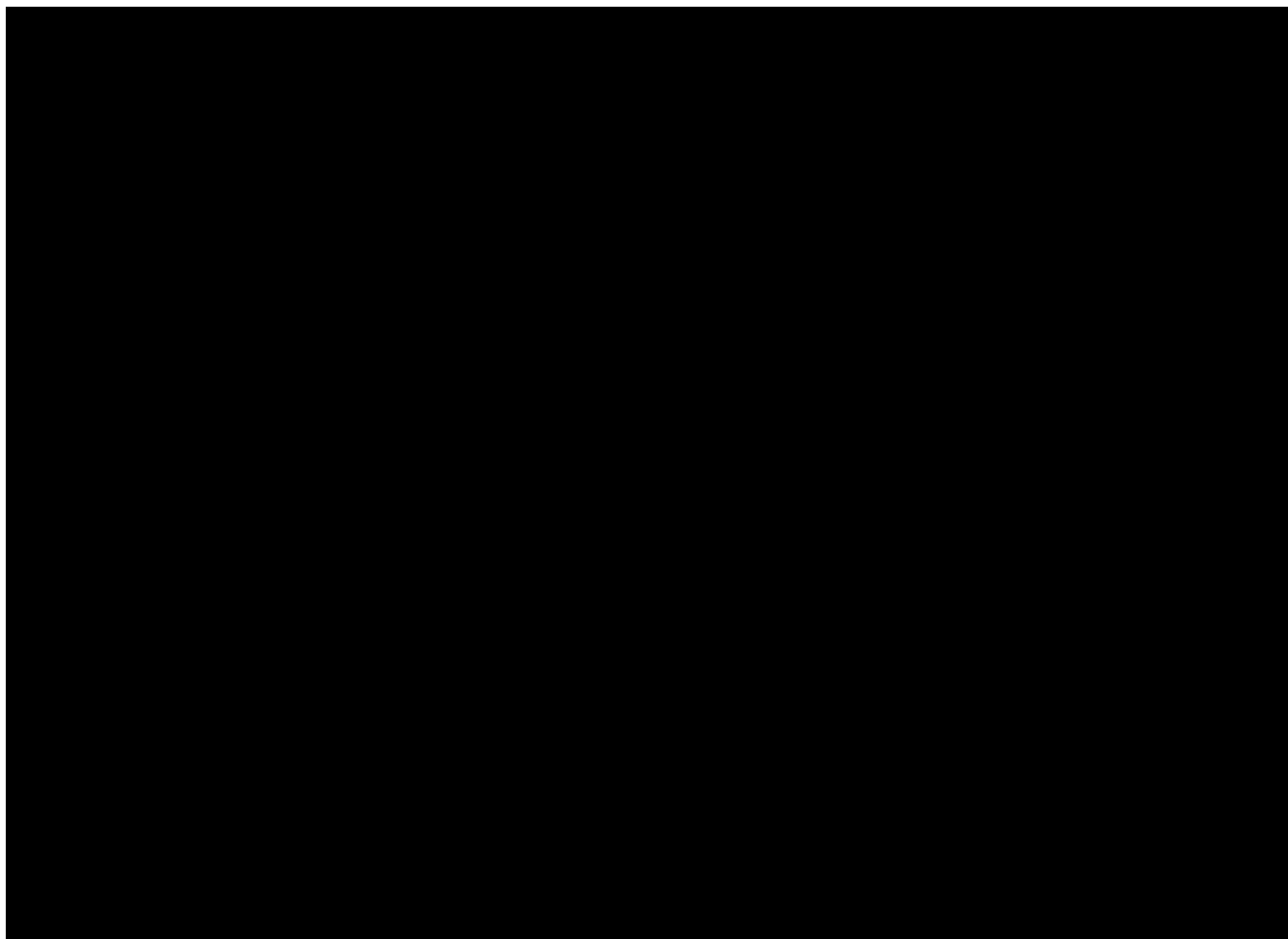
3. Schedule 5 (*Early Works Payments*) is amended as set out below:



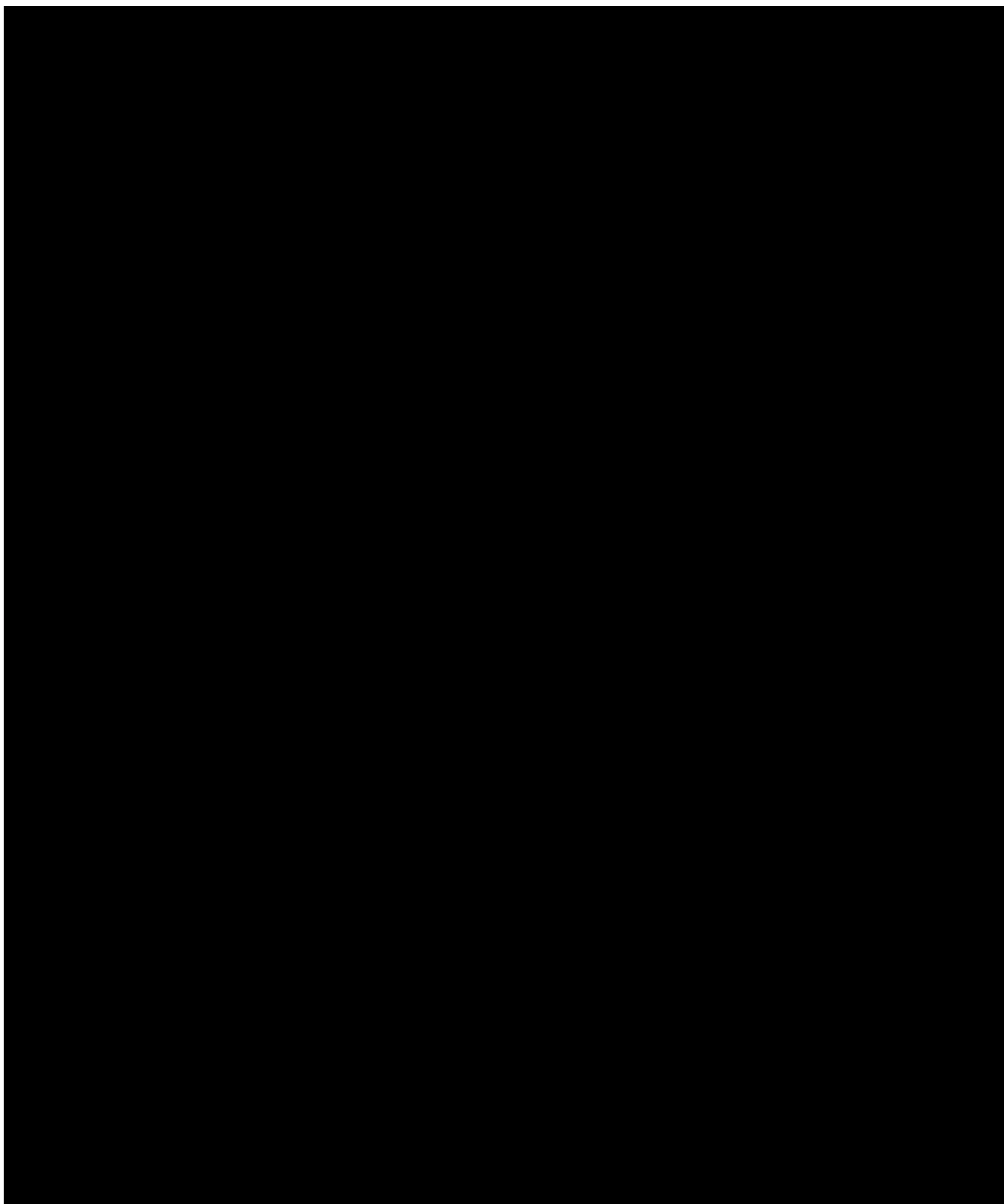
4. Schedule 12 (*Early Works Milestones*) is amended as set out below:

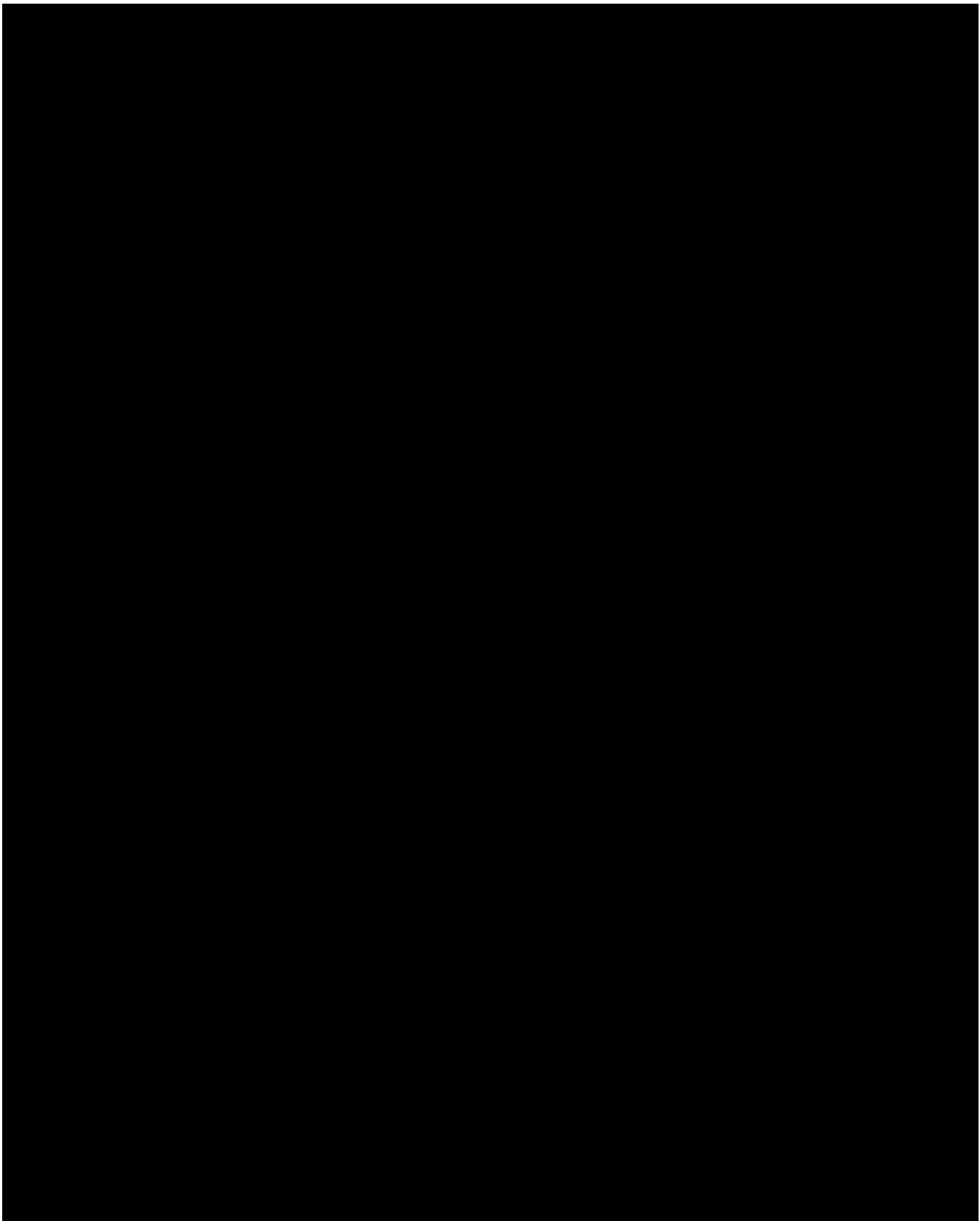


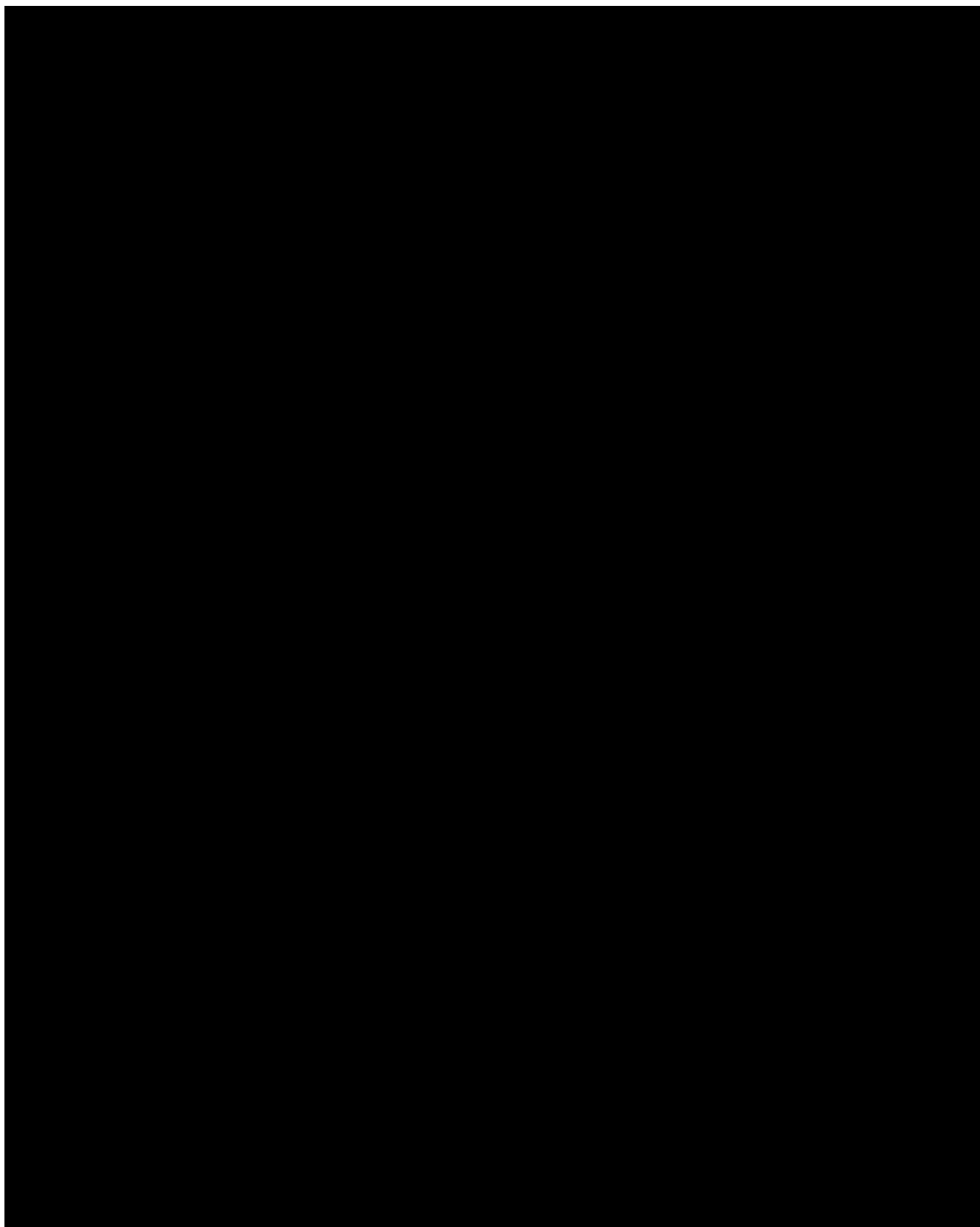


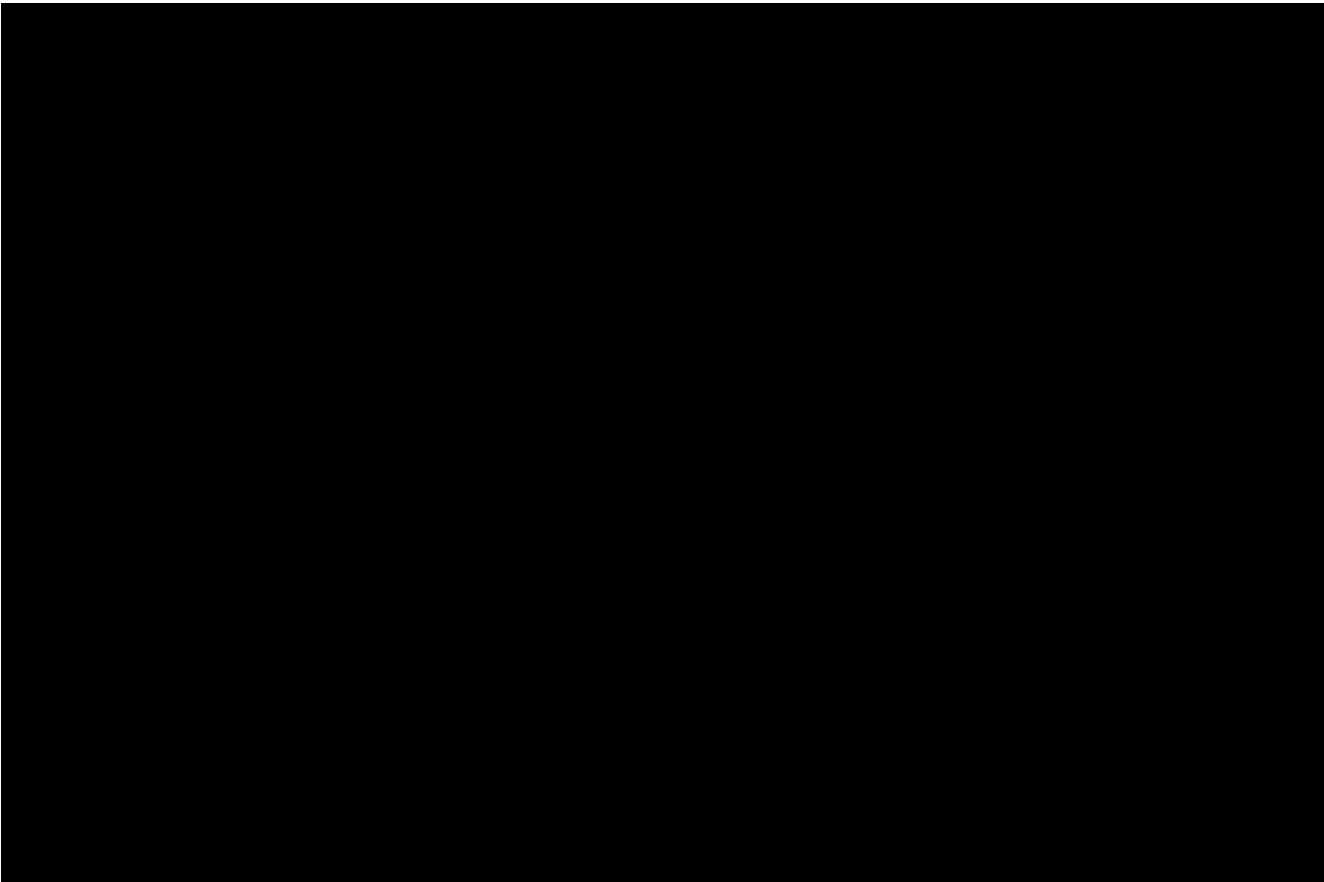


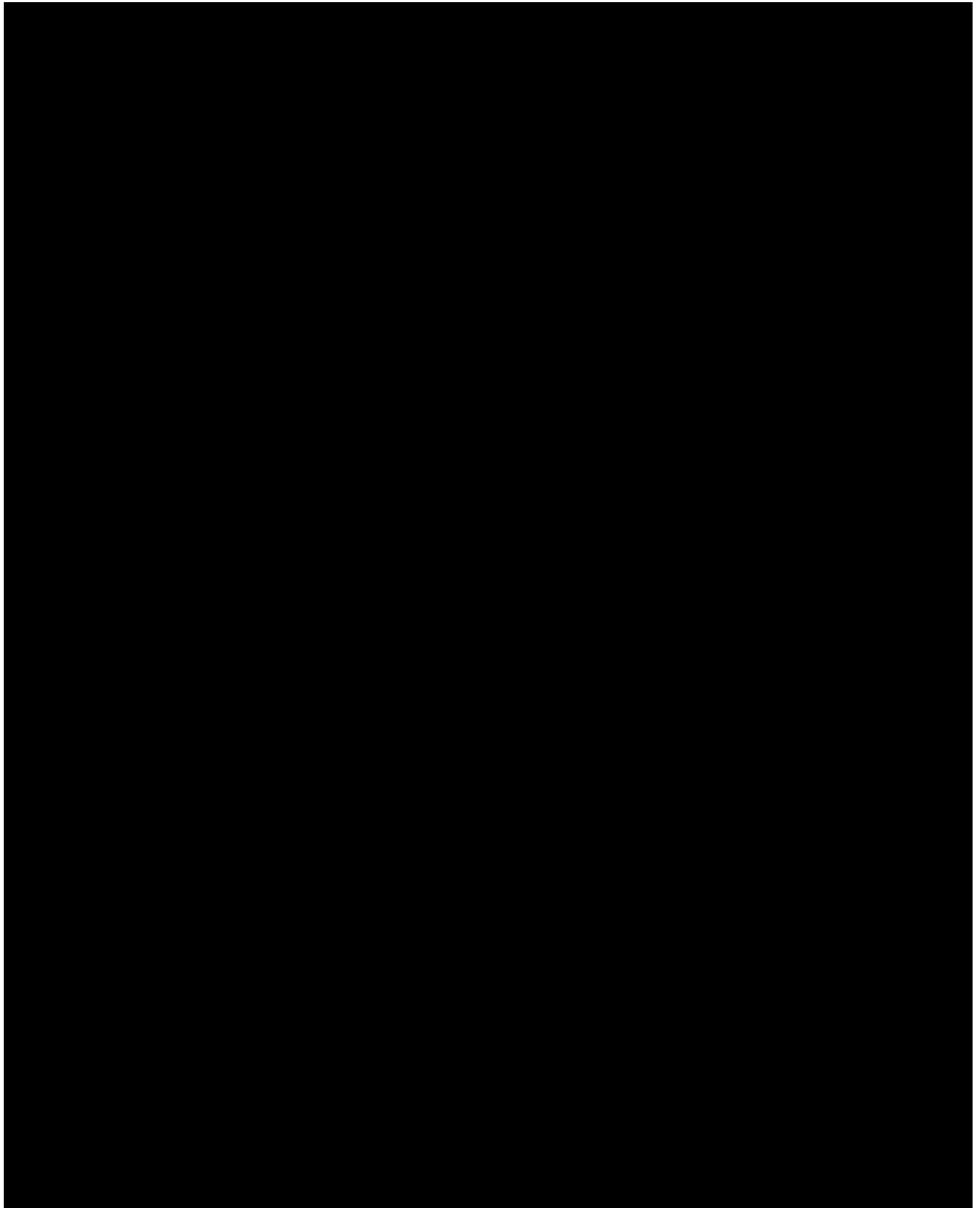
5. Schedule 11 (*Nominated Subcontract Work*) is amended as set out below:

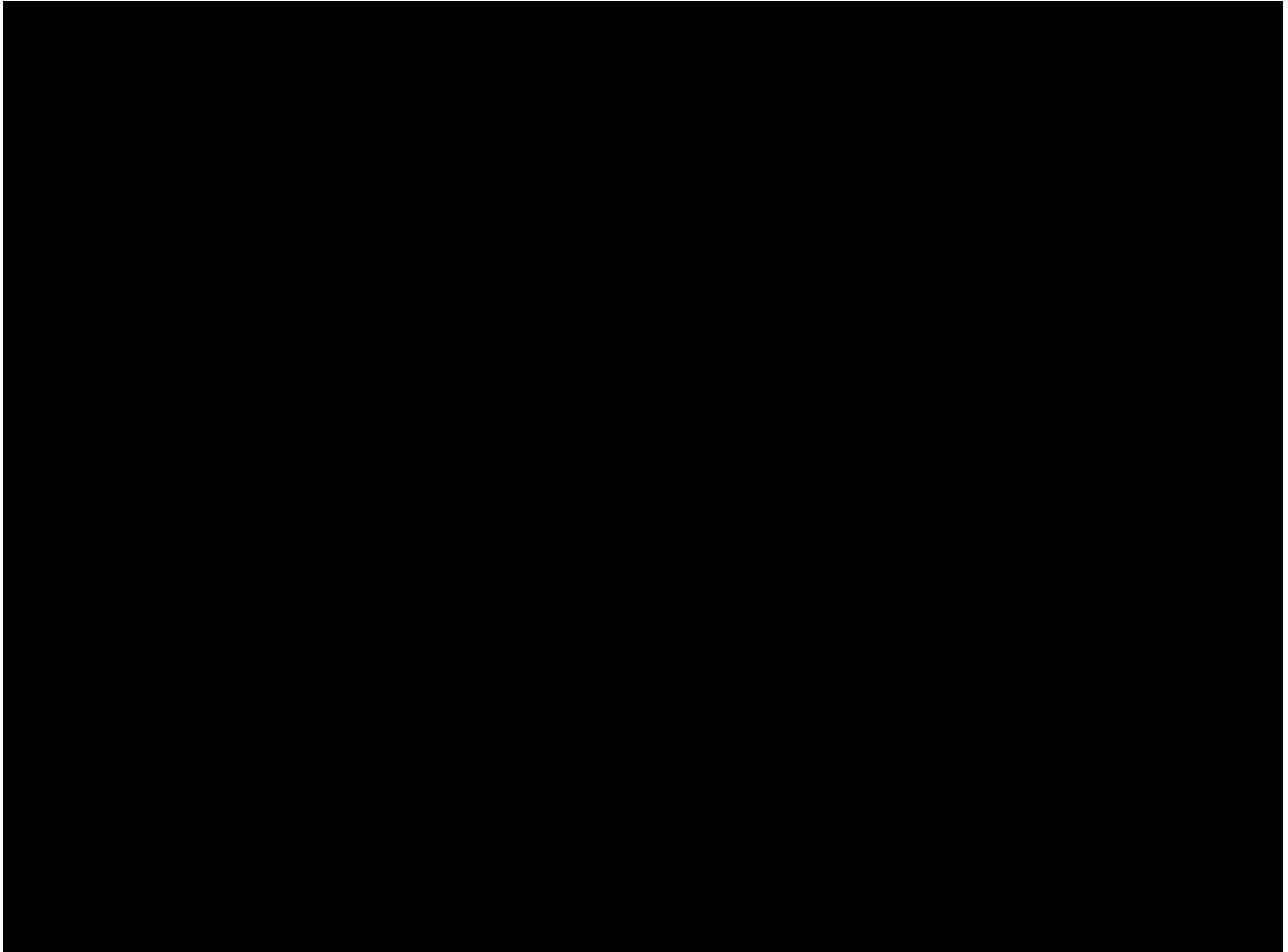


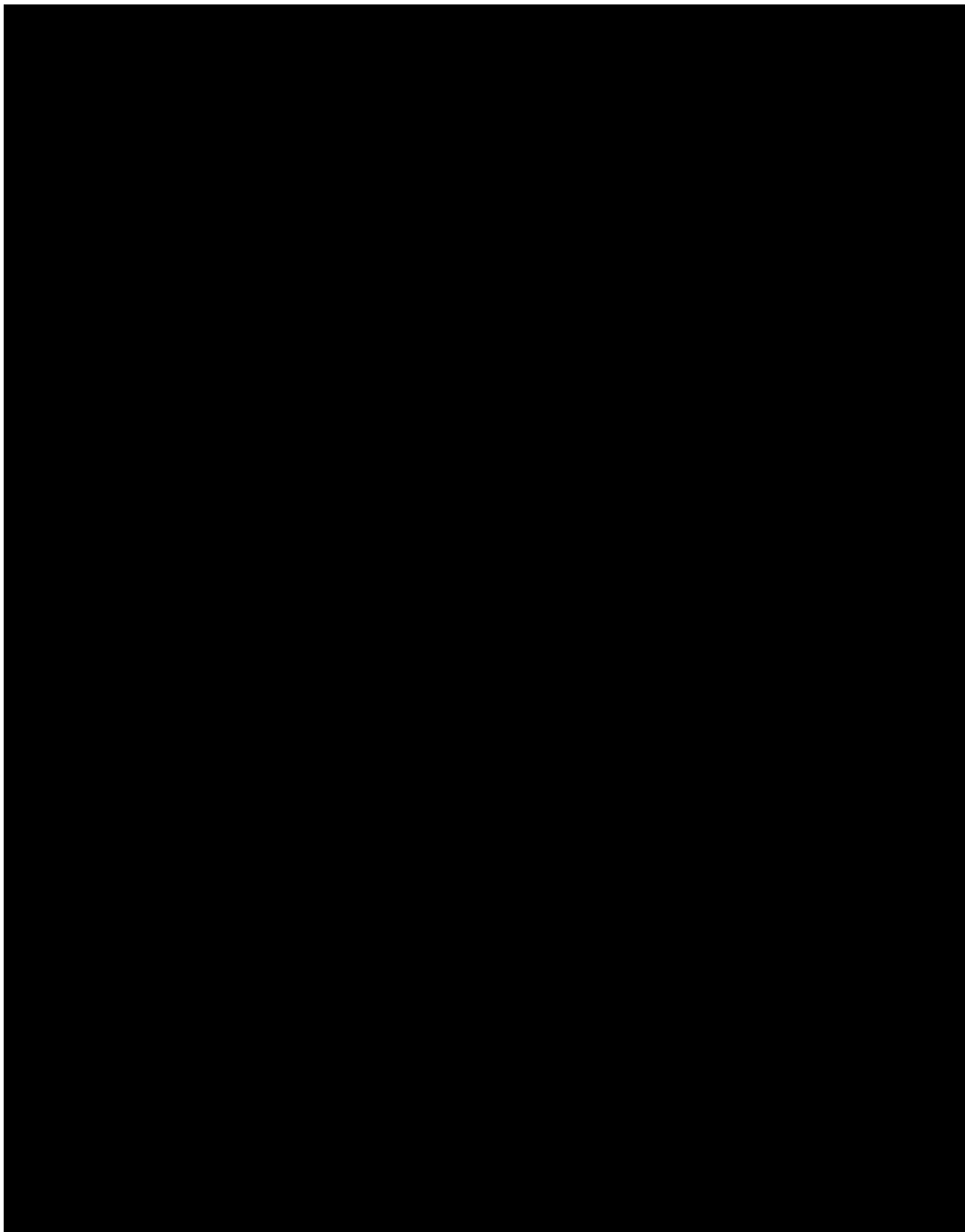


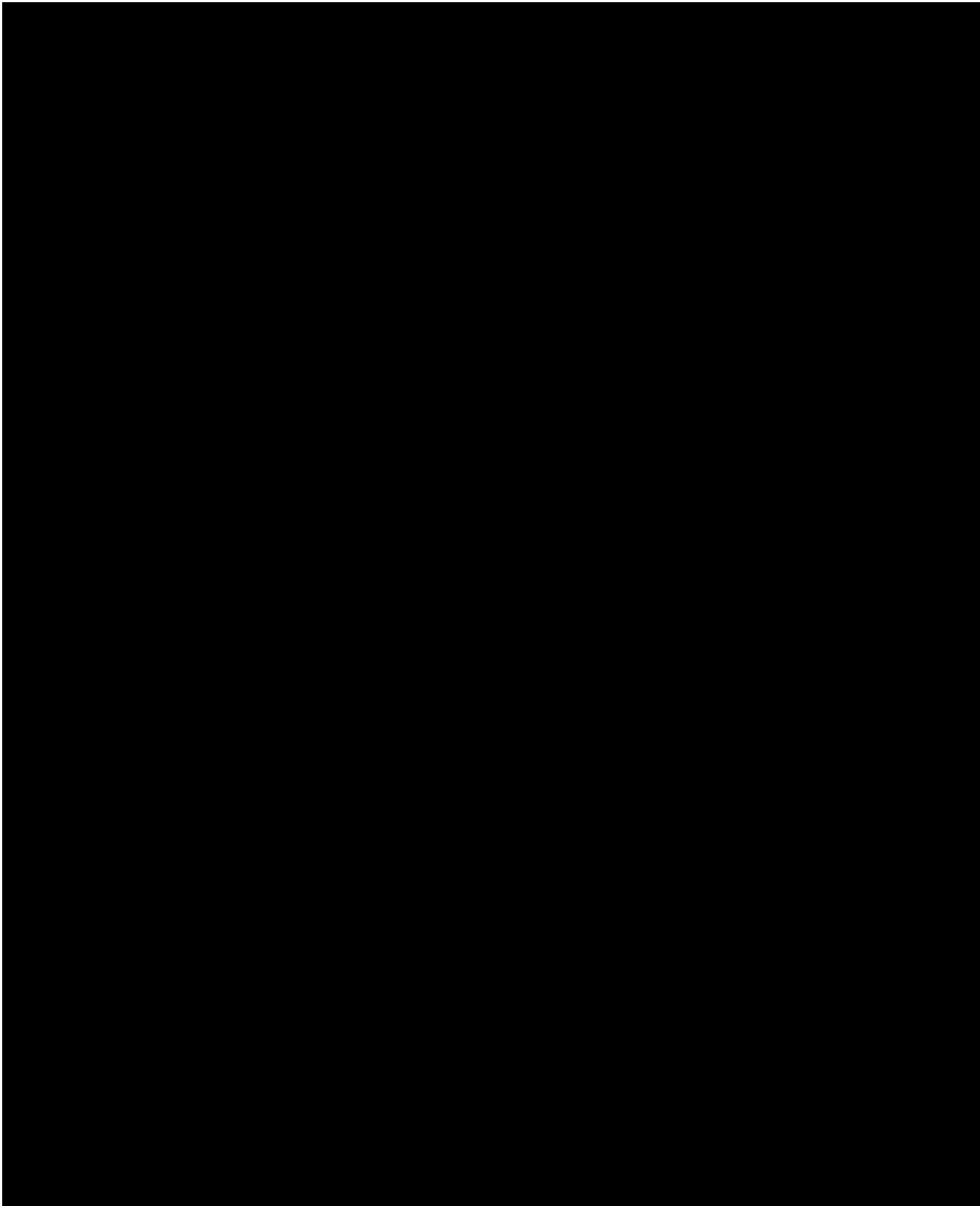


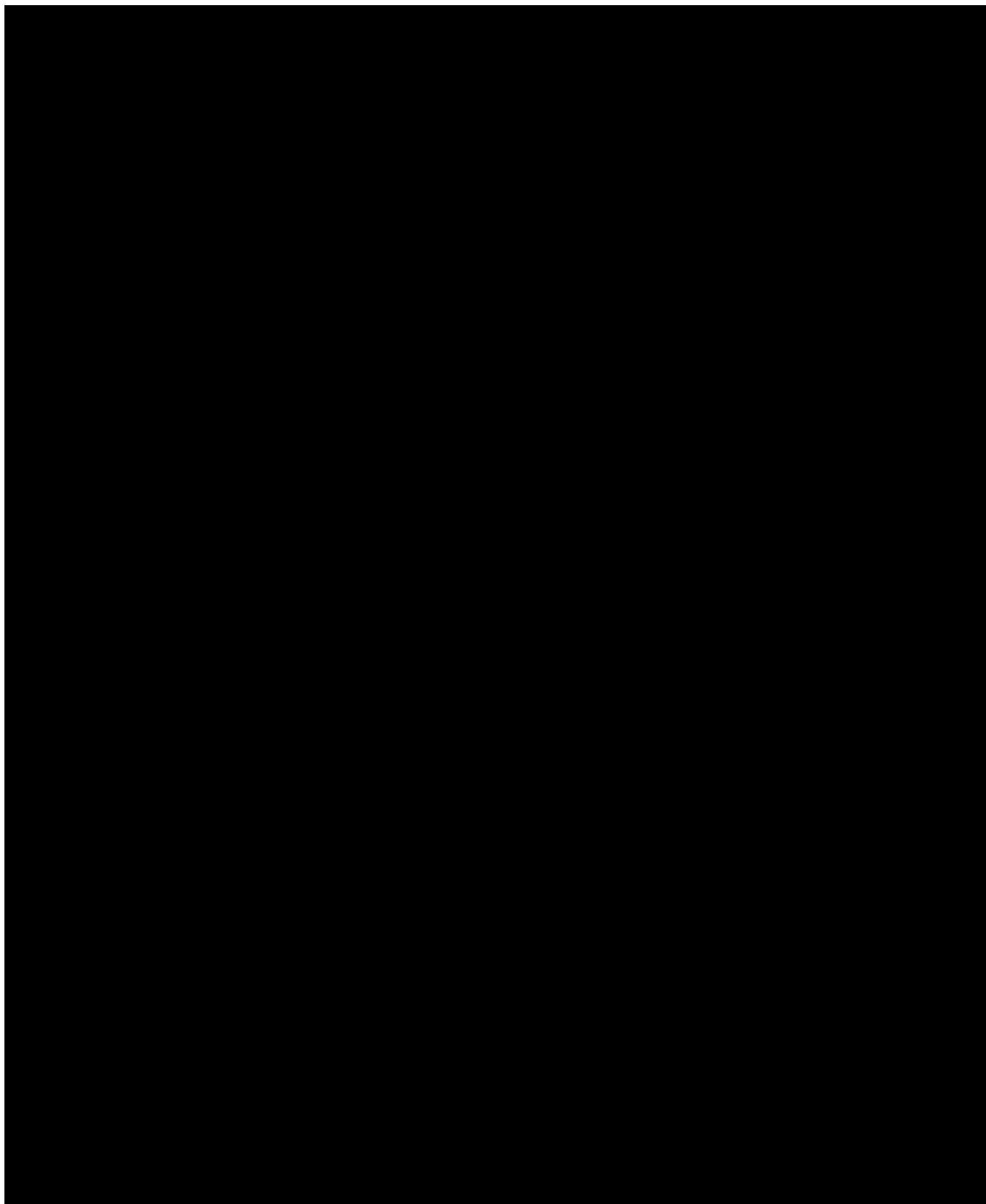


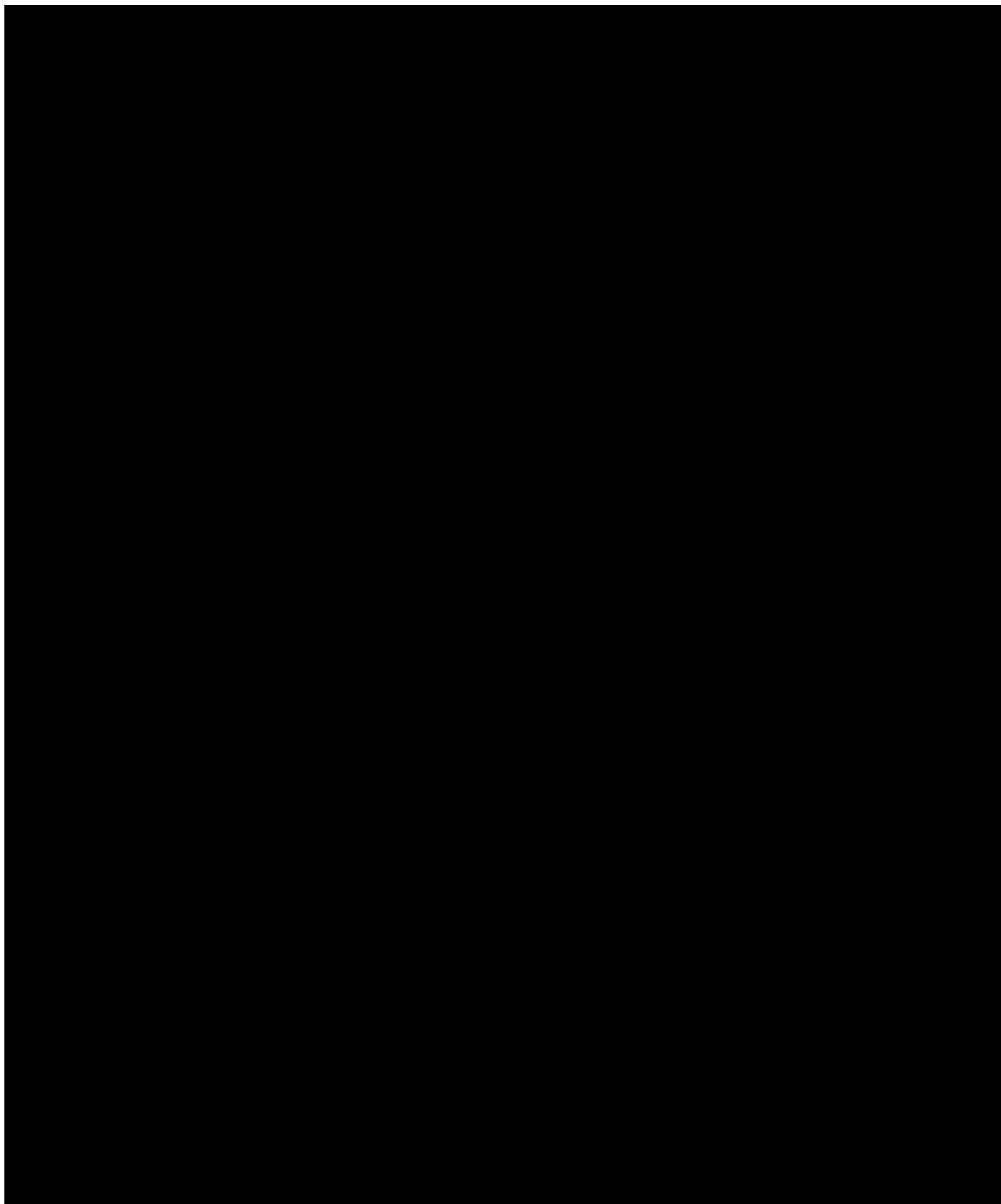


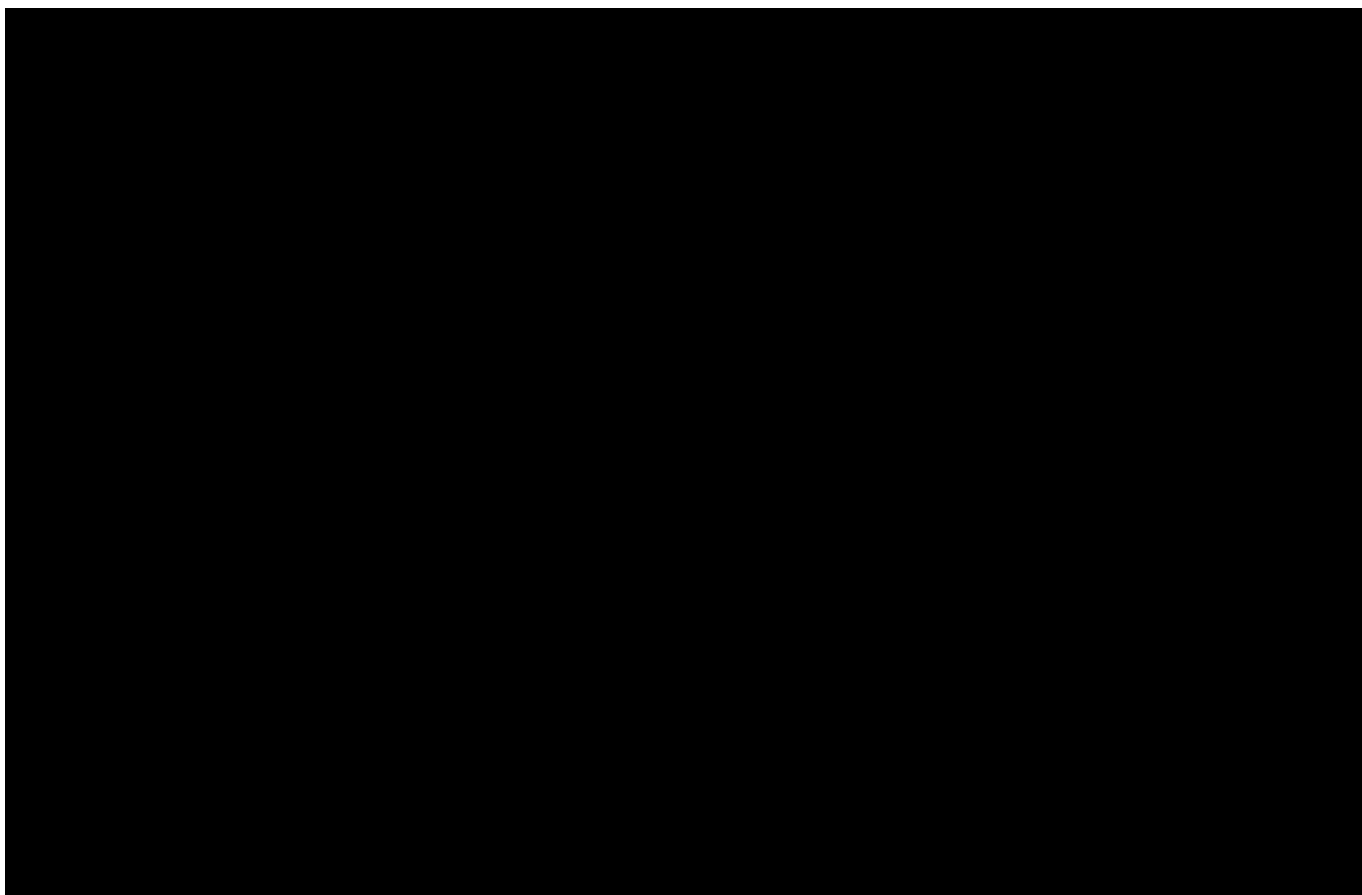


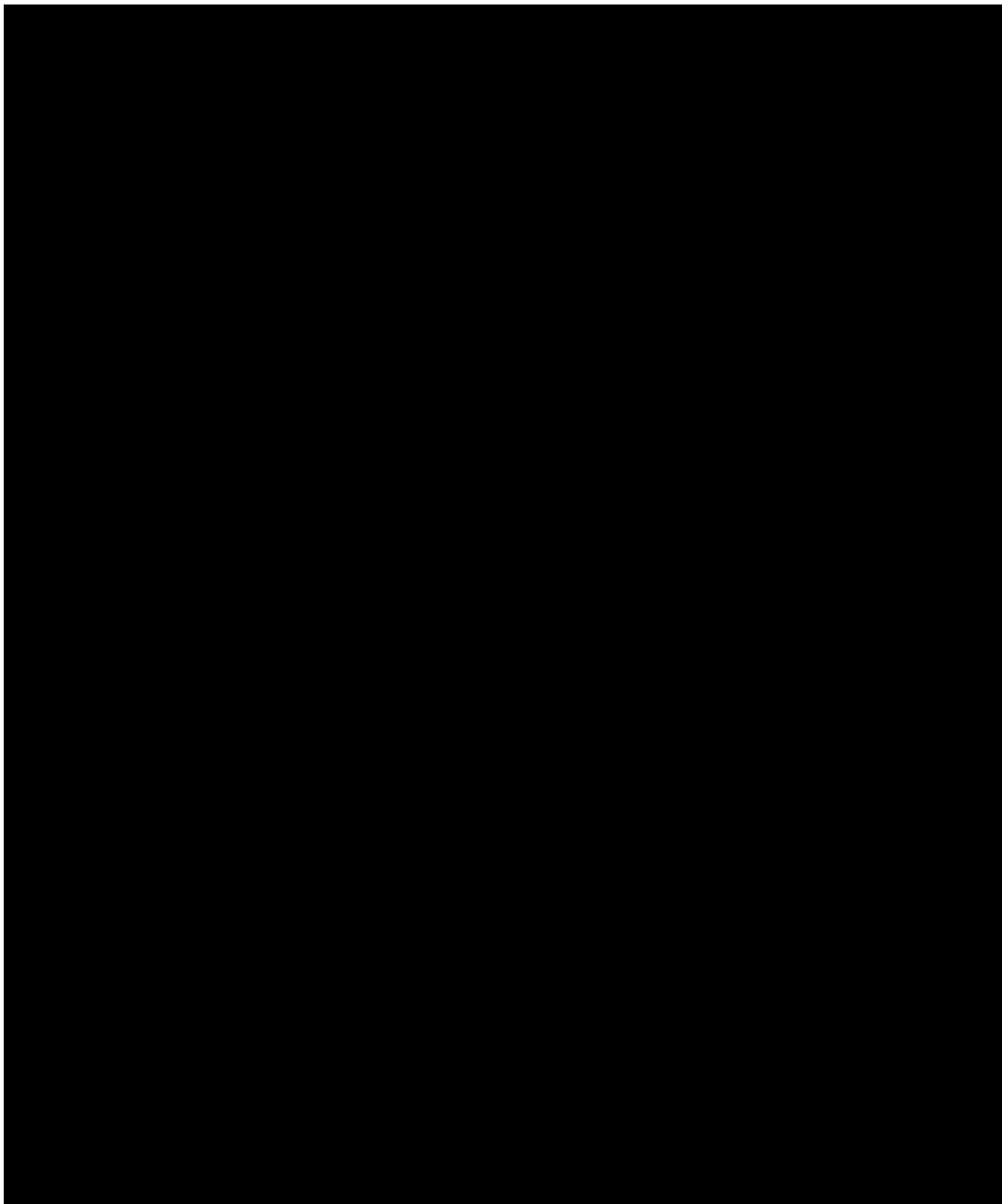


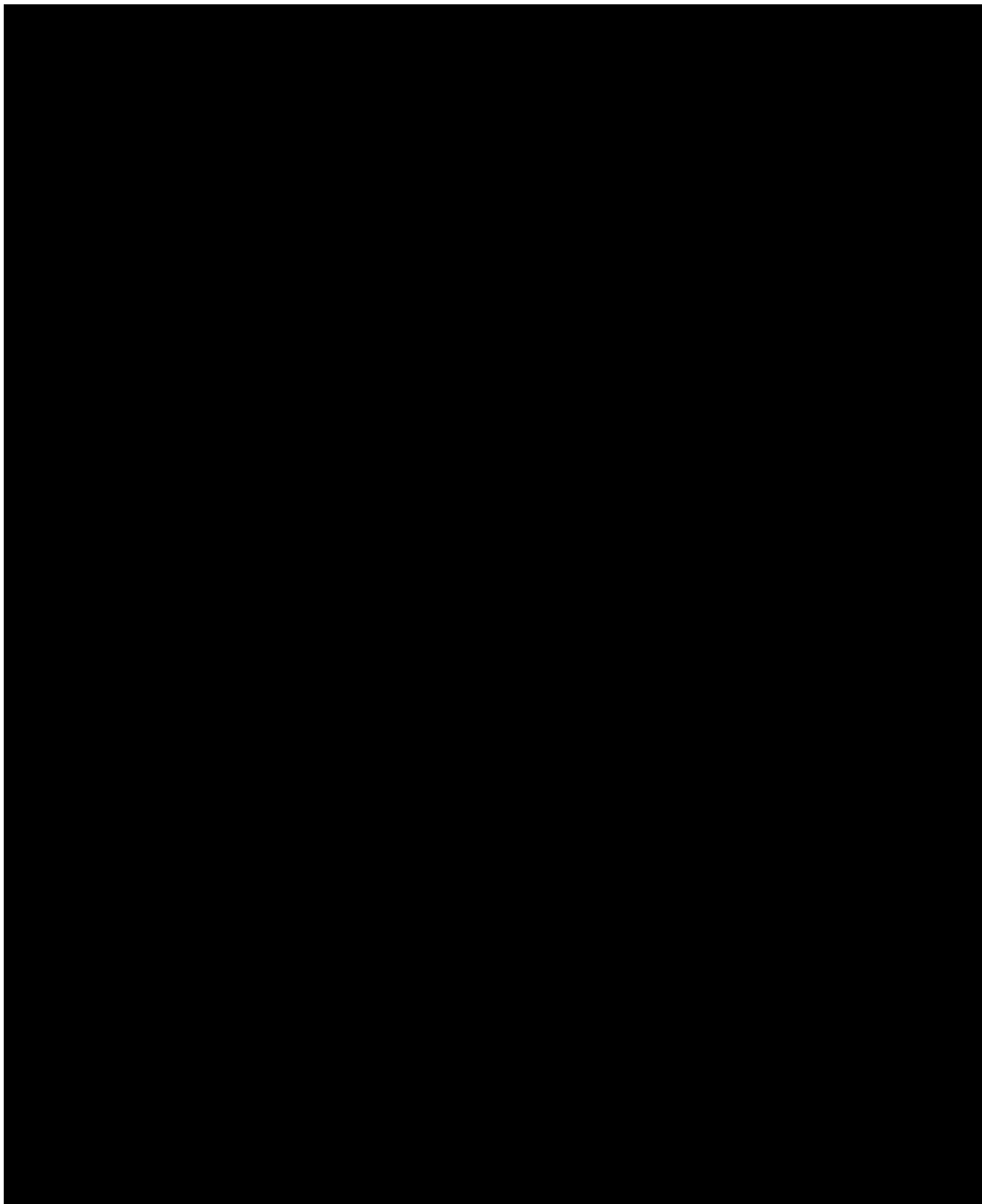


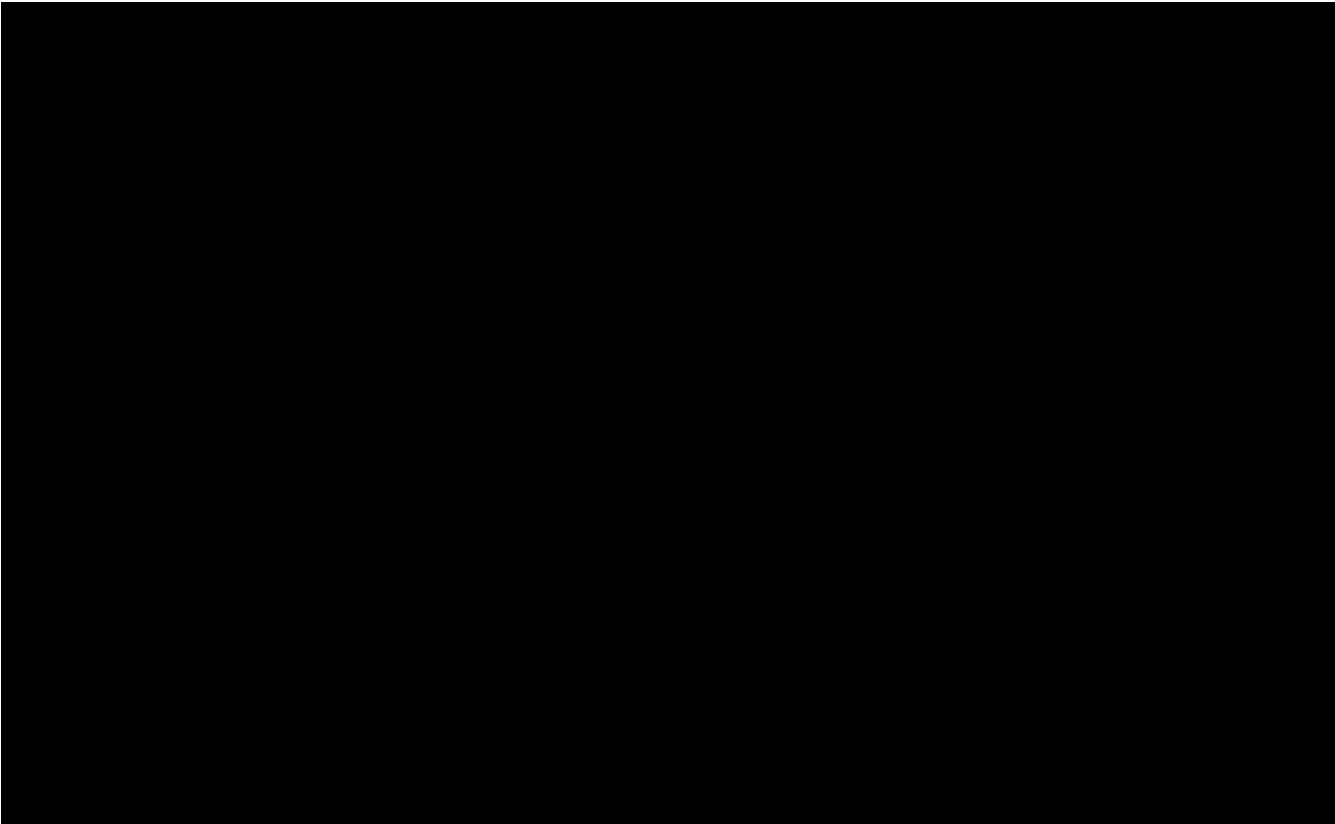






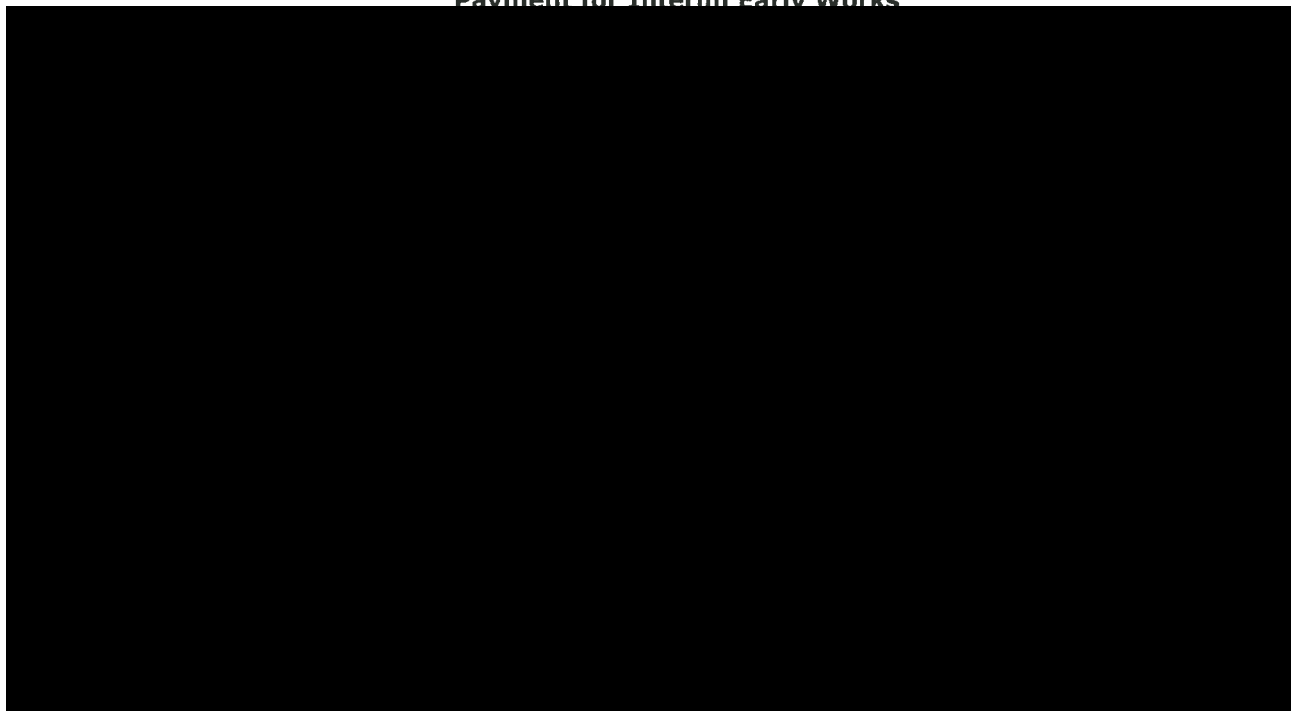






SCHEDULE 2

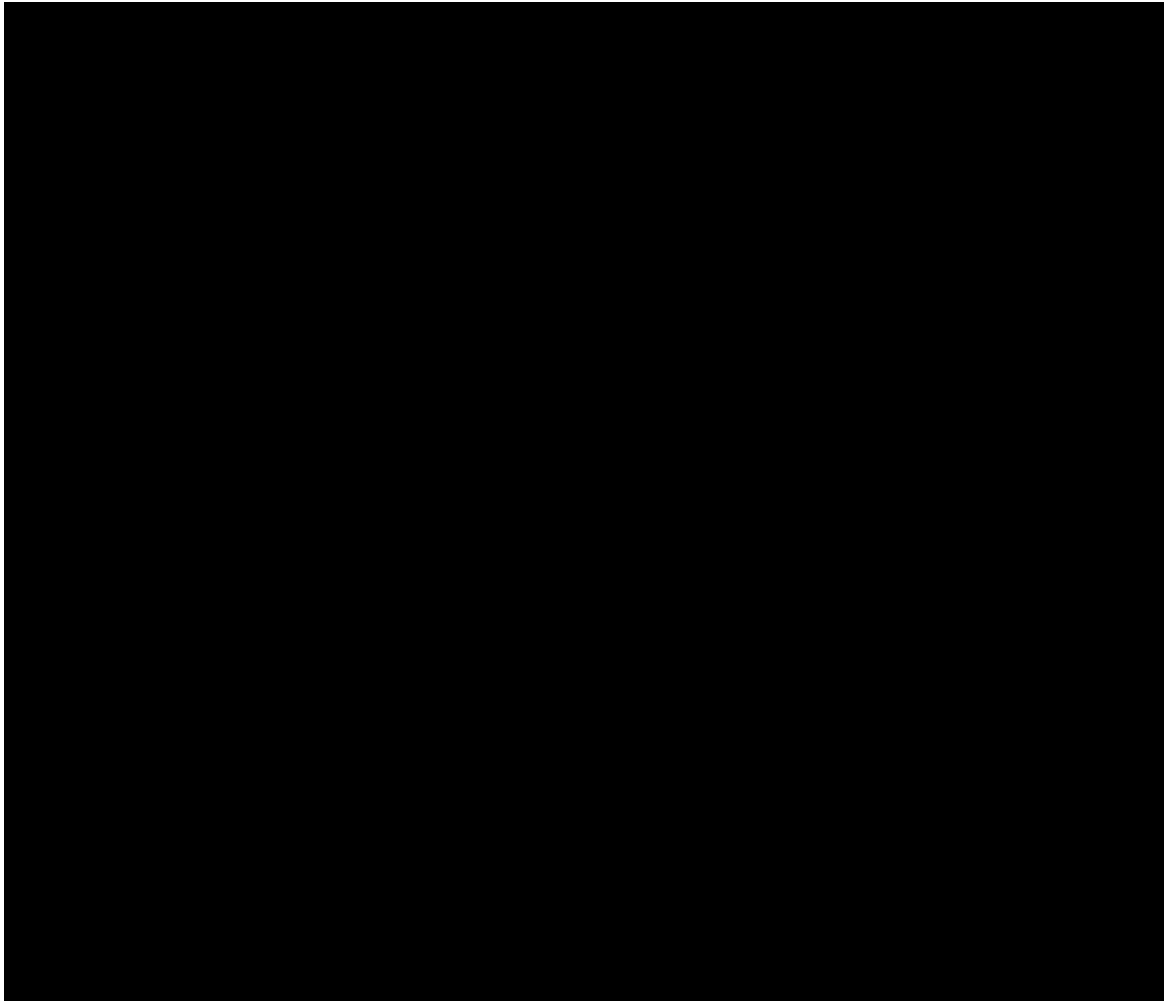
Payment for Interim Early Works



SCHEDULE 3

Checkpoint Milestones (SM) achieved and certified

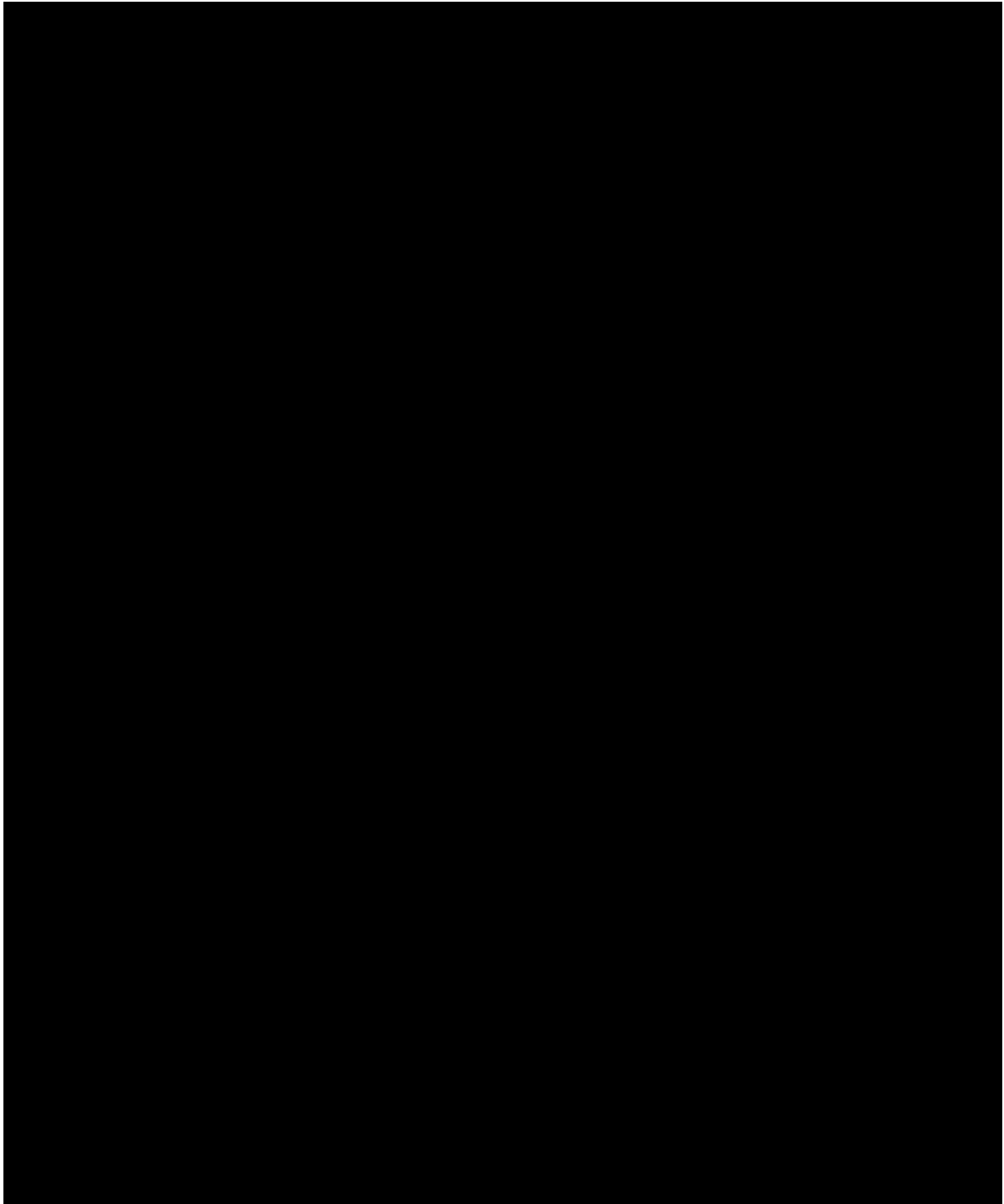
At the date of this letter, the Checkpoint Milestones (SM) achieved by the Nominated Subcontractor under the Significant Contractor EWDs and certified for payment by Sydney Metro, and the corresponding outstanding amounts to be paid by Sydney Metro to the Nominated Subcontractors, are:

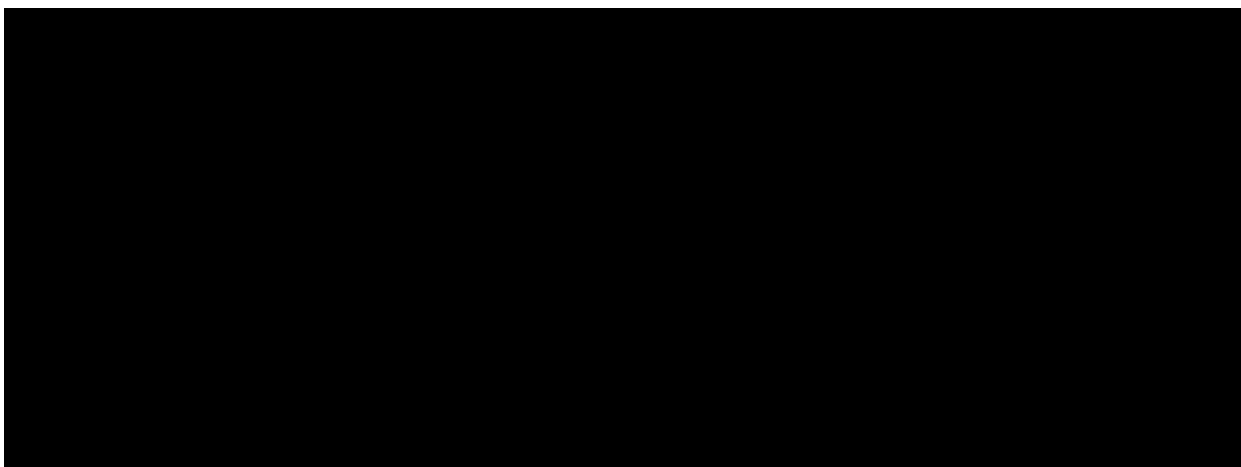


SCHEDULE 4

Checkpoint Milestones (SM) achieved but not certified

At the date of this letter, the Checkpoint Milestones (SM) achieved by the Nominated Subcontractor under the Significant Contractor EWDs but not certified by Sydney Metro, and the corresponding outstanding amounts are:





SCHEDULE 5

Outstanding Checkpoint Milestones (SM)

At the date of this letter, the Checkpoint Milestones (SM) not achieved by the Nominated Subcontractor under the Significant Contractor EWDs, and the corresponding outstanding amounts to be paid by Sydney Metro to MTR, are:

